IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-407

MIRIAM WINTERS,
Plaintiff-Appellant,

v.

ABE LAVINE, et al.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Introduction

Appellant appeals from the judgment of a three-judge panel of the United States District Court, Eastern District of New York, entered on July 21, 1976, dismissing the complaint on grounds of *res judicata* and abstaining on her civil rights actions against the Commissioner of the New York State Department of Social Services and the Commissioner of the New York City Department of Social Services for denying her certain Medicaid payments for Christian Science healing in violation of her First Amendment freedom to practice her religion. Appellant submits the statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court is not yet officially reported. A copy of the opinion is appended.

Jurisdiction

This suit was brought in the United States District Court pursuant to 28 U.S.C. § 1343 and § 1331. The action for damages, declaratory and injunctive relief was authorized by 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202.

The judgment of the three-judge panel of the District Court was entered on July 21, 1976. A notice of appeal is being filed concurrently with this jurisdictional statement. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253.

The Statute Involved

The statute involved in this suit, New York Social Services Law § 365-a provides:

> 1. The amount, nature and manner of providing medical assistance for needy persons shall be determined by the public welfare official with the advice of a physician and in accordance with the local medical plan, this title, and the regulations of the department.
>
> 2. "Medical assistance" shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some

> significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the department. Such care, services and supplies shall include, but need not be limited to:
>
> (a) services of qualified physicians, dentists to the extent authorized by paragraph (e) herein, nurses, optometrists, podiatrists and other related professional personnel;
>
> (b) care, treatment, maintenance and nursing services in hospitals, nursing homes, infirmaries or other eligible medical institutions, and health-related care and services in intermediate care facilities, while operated in compliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provision thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in hospitals located without the state; provided, however, that care, treatment, maintenance and nursing services in nursing homes, including those operated by the state department of mental hygiene or any other state department or agency, shall be limited to one hundred days during any spell of illness for persons who are receiving or are eligible for medical assistance under provisions of subparagraph four of paragraph (a) of subdivision one of section three hundred sixty-six of this chapter, plus, with the prior approval of the commissioner of health upon the recommendation of the appropriate medical director, or with the prior approval of the commissioner of mental hygiene in the case of nursing homes operated by the state department of mental hygiene, such additional periods of time as may be necessary in cases of clear need for nursing services;

(c) out-patient hospital or clinic services in facilities operated in compliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provisions thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in any hospital located without the state;

(d) home health care services, including home nursing services and services of home aids and homemaker or housekeeping services in the recipient's home, if rendered by an individual other than a member of the family who is qualified to provide such services, where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a registered nurse;

(e) preventive, prophylactic and other routine dental care, services and supplies;

(f) drugs, sickroom supplies, eyeglasses, and prosthetic appliances except dental prosthetic appliances; provided however that dental prosthetic and orthodontic appliances required to alleviate a serious health condition, including one which affects employability, may be furnished with prior approval in accordance with the regulations of the department;

(g) physical therapy and relative rehabilitative services;

(h) laboratory and x-ray services;

(i) transportation when essential to obtain care and services in accordance with this section, upon prior approval, except in cases of emergency;

(j) care and services furnished by a comprehensive health care organization to eligible individuals residing

in the geographic area served by such organization, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

Questions Presented

When a believer in Christian Science healing sought reimbursement under her Medicaid coverage for the cost of such treatment and was refused by the New York State Department of Social Services:

(1) Is her federal civil rights lawsuit barred on the one hand by *res judicata* by the New York State courts' refusal to find constitutional claim or merit in her lawsuit for Christian Science nurse payments* *and* simultaneously barred, on the other hand, by *abstention* when there are outstanding claims for payment for Christian Science practitioners not in active litigation and not filed in State Court *or* doesn't such a combination completely prevent access to federal courts directly offending the Constitution, the Civil Rights Act and public policy?

(2) Is denial of payment for healing because it is effectuated by "religious" means a violation of the First Amendment Freedom of Religion?

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* A Jurisdictional Statement #76-81, *Winters* v. *The Commissioner of the Department of Social Services,* is presently before this Court, with a request it be joined with this appeal.

Statement of the Case

Appellant Miriam Winters has been a follower of Christian Science belief and practices for over thirteen years. Because of her religious faith, she does not believe in using the services or treatment of the medical profession as practiced by "physicians" and "nurses". Miss Winters believes that any illness she may have can be cured by the treatments administered by Christian Science practitioners and nurses. The practice of eschewing conventional medical treatment is among the most fundamental tenets of the Christian Science faith.

Miss Winters was ill, periodically, from mid-1973 through 1974. During each period of illness she sought the services and treatment of Christian Science practitioners and nurses, all of whom were certified by the First Church of Christ, Scientist of Boston, Massachusetts.

Miss Winters submitted the bills for these services to the New York City Department of Social Services for payment by the State's Medical Assistance (Medicaid) Program. As a recipient of State public assistance and, since January 1, 1974 Supplementary Security Income, appellant is completely eligible for Medicaid benefits.

The first such request was made in a letter dated November 12, 1973 (A-98). In response to this letter, W.W. Kass, acting on behalf of the City of New York, rejected appellant's request for payment by Medicaid of bills totalling $78.66 for treatments and supplies appellant received from a Christian Science nurse. (A-99) A hearing to review this denial was held on December 18, 1973. The Decision After Hearing rendered on February 20, 1974, affirmed the Department's denial of such payments on the ground that payment was not authorized by New York Social Services Law §365-a. (A-101)

Appellant then appealed to the New York State Supreme Court for the County of New York, pursuant to Article 78 of the New York Civil Practice Law and Rules. Pursuant to the State's motion, this appeal was transferred by that court to the Appellate Division, First Department.

The Appellate Division, by decision dated October 16, 1975, affirmed the decision of the Department of Social Services denying the appellant payment for her treatment by a Christian Science nurse. (A-108) Appeal was taken on constitutional grounds to the Court of Appeals which dismissed the appeal *sua sponte* on the grounds of the lack of a constitutional question. (A-112)

The second request for payment by Medicaid of Christian Science treatments totalling $90.00 was made in a letter dated December 21, 1973.* When appellees failed to repond to this request, appellant requested a hearing, which was held on March 7, 1974. The Decision After Hearing rendered on March 27, 1974 reversed the Department's decision and ordered it to pay the $70.00 of the $90.00 bill submitted by appellant. (A-120) Only after appellees were threatened with a lawsuit to force compliance did they comply with the Decision After Hearing, by payment of $70.00 in the first part of August. See, *e.g.* (A-123).

The third request was made in a letter from appellant's attorney, dated March 1, 1974, requesting payment totalling $194.00 for Christian Science treatments rendered by Benjamin Rippe, C.S. (A-113). In a letter dated March 7, 1974, Dr. Lee B. Reichman, on behalf of the City of New York rejected this request (A-115). In response to a similar letter from appellant's attorney, dated March 12, 1974 (A-117). Phillip A. Roos, on behalf of the Bureau

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* To keep the appendix short, some documents have not been included. They appear in the record of the court below.

of Medicaid rejected the request in a letter dated March 21, 1974 (A-118).

A hearing to review these denials was held on May 9, 1974. The Decision After Hearing rendered on May 30, 1974, affirmed the Department's denial of payment on the ground that New York Social Services Law §365-a does not include services rendered by a Christian Science practitioner. Article 78 proceedings to appeal this determination in New York State Supreme Court were filed but have not been pursued since the 3-judge panel was convened.

Appellant made a fourth request for payment of Christian Science treatments amounting to $56.00 in a letter to both Dr. Lee B. Reichman, and Phillip A. Roos. As of the date this complaint was filed in this court and until now, defendants had failed to answer this letter.

Prior to the commencement of this suit, appellant incurred additional bills totalling $33.00 for Christian Science treatments. In light of her experience with appellees' repeated denial of Medicaid reimbursement, appellant made no request for payment of this bill and instead initiated this proceeding in the United States District Court.

On September 15, 1975, a 3-judge panel was ordered convened by Judge Bartels (A-25). Argument and briefs were had before the statutory court, and decision was rendered on July 21, 1976, with Judges Hays and Bartels holding the claim for nursing reimbursement was barred by *res judicata* and the claim for practitioner barred by abstention. (A-34) Judge Dooling concurred as to the nursing care and dissented as to practitioners arguing that since they weren't licensed, their bills weren't entitled to reimbursement (A-73). On August 10, 1976, the attorney for Miriam Winters sent the panel a letter suggesting that abstention was no longer appropriate since subsequent to the 3-judge panel argument the highest court in New York

had dismissed the constitutional claim (A-126). By a phone call counsel was informed that the abstention only applied to practitioners and even though it was the identical statute, the court would continue to abstain on the constitutional issue of payment for Christian Science treatment. Notice of Appeal was filed on September 15, 1976 (A-128).

THE QUESTIONS ARE SUBSTANTIAL

I.

This Federal Suit Is Not and Should Not Be Barred by Either Abstention, *Res Judicata*, or Their Combination.

Federal courts exist to give federal remedies for federal wrongs. Foremost in this field of protection are constitutional rights. See *Bell* v. *Hood*, 327 U.S. 678 (1946). The Civil Rights Act was enacted specifically to protect people's constitutional rights. This civil rights case is about one of those important constitutional rights: Freedom of religion. The appellant rightfully sought her relief in a federal forum but was denied access by the mistaken invocation of two exceptions to this general principle applied jointly in a self-contradictory manner. We will take them up separately and jointly.

i

Res Judicata

The District Court's ruling that the appellant could not launch a constitutional attack on the denial by appellees of Medicaid payment for the services of a Christian Science nurse because the appellant fully litigated her constitutional claim in state court and was therefore estopped by

the doctrine of *res judicata* from relitigating the issue in a federal forum is clearly wrong, both on the law and the facts. See, *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

The 3-judge District Court found that the appellant had "clearly and explicitly submitted" her constitutional claim "to the Appellate Division, First Department, in her prior Article 78 proceeding." (The court, therefore, concluded that the doctrine of *res judicata* barred reassertion of the issue in the federal court.) This determination purported to follow *Newman* v. *Board of Education,* 508 F.2d 277 (2d Cir., 1975). But the criteria used by the Court below to decide whether appellants' constitutional claims were litigated are far more limited than those envisioned in *Newman* which looked not only to the question of whether the constitutional issue had been raised, *but also* to whether the decision reflected its consideration. *Newman* v. *The Board of Education,* 508 F.2d at 278.

The Court of Appeals in *Newman* held that the appellant's federal action was not barred by *res judicata.* It stated,

> "It is clear from the record that appellant never raised her federal constitutional claims in state court. There is no mention of any claim of procedural due process in the New York Supreme Court's opinion; indeed, it specifically went off on other considerations." *Newman* v. *The Board of Education,* 508 F.2d 277 at 278.

This holding reversed the finding of the District Court which had concluded that the appellant had raised the issue of due process violations and was, therefore, precluded from raising them in a federal forum. (This initial rejection was based on an allegation in the *Newman* state court

petition that the state's action violated the due process and equal protection clauses of the 14th Amendment).

Analogously here, in her state court action, the appellant alleged a violation of her First Amendment right to exercise her religious preferences, as recognized and protected by this court's decision in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). But that assertion was made in the context of her claim for benefits believed to be required by state statutory law. The mere mentioning of constitutional claims in the context of a state court proceeding is not sufficient to preclude the appellant from asserting her right fully in a federal forum. Indeed, in *Government and Civic Employees Organizing Committee, C.I.O.* v. *Windsor,* 353 U.S. 364 (1957) and again in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964) this court recognized the necessity, in many cases, of asserting constitutional issues so that a state statutory claim can be decided by a state court in proper perspective. In holding that appellant's brief assertion of her constitutional right in the state court, required to give that court a complete picture, should now bar federal adjudication of that right is to force appellant onto a tigthrope impossible of a successful traverse.

The opinion of the Appellate Division does not mention any constitutional issue. In fact, that Court disposed of the case by accepting respondent's position in its brief in opposition that the record was insufficient to demonstrate appellant's entitlement to benefits. (See, A-108). Respondent's contended "the record provides no basis for reviewing respondent State Commissioner's decision, and the purported constitutional issue is not properly before the Court." (Respondents' brief to the Appellate Division, p. 7). Furthermore, in their state court brief respondents also asserted that appellant's constitutional challenge

should be heard by the federal district court, i.e. the Court below:

> "Since petitioner challenges the Decision After Hearing under the Federal Constitution (Brief, Point II) and it is clear that the decision is in accord with the Federal Regulation, the petition implicitly challenges the constitutionality of that Regulation. This contention is for the United States District Court of New York where petitioner's independent action, *Winters* v. *Lavine*, 74 C. 1703, is now *sub judice*." (Respondents' brief, p. 8.)

The Appellate Division apparently adopted this reasoning in holding, as related above, that the record was insufficient to establish appellant's entitlement to benefits. It would be most unfair and ironic to conclude* that despite the respondents' consistent contention that the constitutional issue was not even properly before the State Court and should be in federal court, the issue was sufficiently litigated in State Court to preclude assertion in the federal court, even after the Appellate Division denied the existence of any constitutional issue and the Court of Appeals dismissed *sua sponte* on the claimed absence of any constitutional issue.

The rights federal courts protect are crucial to the constitution and central to the federal judiciary's concerns. *Res judicata* is a doctrine used to prevent multiplicity of litigation. It should not be mistakenly imported to prevent the federal court's proper functioning to protect democratic freedoms.

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* The 3-judge panel held, text and footnote at footnote 8, that the constitutional issue was presented to the Appellate Division (and therefore implicitly to the Court of Appeals), but that is not what ensued. The state courts held there was no constitutional issue presented.

ii

Abstention

It has long been settled that the theoretical existence of a state court remedy does not bar the immediate filing and adjudication of a federal Civil Rights Act case to protect constitutional rights. See, e.g. *Damico* v. *California*, 389 U.S. 416 (1967); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). In this case one State court action was filed but not pursued and another claim never brought to State court attention.

The 3-judge Court held, in contradiction to the Appellate Division's holding, that the constitutional question was presented to the Appellate Division, considered and ruled on. The appeal to the Court of Appeals was dismissed for lack of a constitutional question. If this denial of a constitutional question was a ruling on the constitutional merits, then to demand abstention until those courts rule on the unconstitutionality of §365-a becomes patently absurd since they have already ruled. This fact was pointed out to the 3-judge panel. See (A-126).

Rarely has a case been less susceptible to abstention. The central claim is purely constitutional; the legislative lynchpin is federal. Three federal judges have heard the arguments and read the briefs. A crucial constitutional right is at stake. The federal courts should act now to protect it.

iii

The Deadly Combination

The decision indicates the dilemma now faced by litigants because of the conjoint application of the doctrines of *res judicata* and abstention. The horns of the dilemma

are particularly sharp when, as here, the State prescribes a short statute of limitations for the bringing of an action.

New York law allows only four months to commence an action to review a determination by a state officer or agency. N.Y.C.P.L.R. §217. This brief time is insufficient to allow a litigant to initiate a federal court action, receive a decision of abstention, and commence a state court proceeding reserving the federal issues as suggested in *England v. Louisiana State Board of Medical Examiners, supra.* Due to the short statute of limitations, a litigant desiring a federal decision may be compelled, as appellant did here, to commence lawsuits simultaneously in both state and federal courts. Since the state action was not commenced at the suggestion of an abstaining federal court, appellant could not confidently "reserve" her federal claims. The failure to assert those claims in some manner could have had three consequences. Firstly, the traditional version of *res judicata* could have been applied in federal court precluding appellant from litigating any claim she raised or could have raised in the state court proceeding as may have happened here. Secondly, the failure to raise the claim in some manner would have run afoul of *Government and Civil Employees Organizing Committee, C.I.O.* v. *Windsor, supra.* Third, the most effective and properly advocated case would not have been presented in state courts to the detriment of the client.

Taking the safer course, appellant protected her rights by filing in both courts and tripped, nevertheless, over the procedural roadblocks. Firstly, her State court action in which she attempted to acquire a statutory interpretation was held to preclude litigation of her federal claim. And, incongruously enough, appellant was greeted simultaneously with abstention on the theory that there was no State court interpretation of her statutory claim. When she

went to State court the result was that the decision obtained was held to bar her federal action. When she didn't go, she was told she was barred because she hadn't. All she wants is her day in court. Her appeal from the State courts who say she has no constitutional case is here in the Supreme Court. This jurisdictional statement from the 3-judge panel who say both going and not going to State courts prevent federal court's vindication of Miriam Winters' rights is here in the Supreme Court. She asks that this Court protect her rights and straighten out the lower courts accordingly. To the nature of those rights, we now turn.

II.

Refusal to Reimburse for Christian Science Healing Treatments Violates the Constitutional Command of Religious Freedom.

Miriam Winters fell ill. Pursuant to her beliefs, she utilized a Christian Science Practitioner and, under his directions, a Christian Science Nurse. They submitted bills to her, some of which she paid. She then sought reimbursement for four bills, and, being denied payment for three, instituted this suit for their payment.*

The federal statute authorizes payment for "medical assistance." 42 U.S.C. 1396 et seq. It specifically recognizes that treatment pursuant to the precepts of the Christian Science Church can be reimbursed as such by reference to the sanitorium and nurses.

Yet, Miriam Winters was denied payment for the assistance she received pursuant to Christian Science reli-

* Partially in order to expedite matters because of her poverty, a joint hearing on rent payments due with the Medicaid claim was held and cross-appeals were filed in State Court. The process is detailed in the companion Jurisdictional Statement, No. 76-81.

gion and practices, with results the medical profession would consider "medical." Such a denial violates the Constitution's command of Freedom of Religion. It also misconstrues the meaning of "medical assistance."

As the dissent details, there are a broad range of reimbursable expenditures including podiatrists, home aides, and psychiatrists.* The only group that appears to be excluded are followers of Christian Science beliefs.

Christian Science, according to its dogma, heals by prayer. However, this practice and method should not condemn it. What for the religious person may appear as prayer and the cure from God may appear to an atheistic medical observer as psychiatric practice. So too the

* Contrary to the thrust of the dissent and as the Court was informed, not all people practicing "psychotherapy" are required to be licensed. Under New York law, anyone can hold himself out to practice psychotherapy and some indeed do—people who believe that they can help, various graduates of social work schools, graduate school programs, and M.D.'s with no psychological training at all. On the other hand, Christian Science Practitioners have to be licensed by the church. (One wonders if some of the psychotherapists do anything differently from a Christian Science practitioner who talks to the believer about the perceived troubles conceived as non-bodily.)

Even if Christian Science was excluded on the basis of failure to possess normal healing licenses, this just translates the constitutional defect to another forum. Can the State insist on licensing or refusing to license a practitioner of a healing art where the religion connected to the healing art prohibits such supervision or licensing? It should be noted that the category for reimbursement is not a narrow one, such as only M.D.'s, but rather a whole range of "healing arts," including anything which can be labeled "clinical psychology." Title 18 NYC RR 526.

Sums paid to Christian Science Practitioners are deductible medical expenses for IRS. See (A-77). Christian Scientists wealthy enough to pay taxes have their medical expenses subsidized by the state; only the poor Christian Scientist is denied payment for using a Christian Science Practitioner. Cf. *Harper* v. *Virginia Board of Education,* 383 U.S. 663 (1966).

reverse: for a Christian Scientist treatment by what they characterize as "materia medica" has no effect at all so that any improvement can only be understood and explained by their religious tenets. Just because Christian Scientists characterize some of their healing as "prayer" and doctors some of theirs as "chemo-therapy" doesn't mean either should be denied Medicaid reimbursement. *A fortiori,* when the reason for denial is that such healing was done by "prayer," the First Amendment freedom of religion mandates the unconstitutionality of the refusal to reimburse.

The dissent suggests that payment may create establishment problems. Clearly not. Miriam Winters exercised her free choice of healing (as the statute as well as the First Amendment permits). She now seeks reimbursement for the expenses of such a choice. The fact that she chose what for her was "religious" is irrelevant to the neutral nature of the reimbursement. In *Everson* v. *New Jersey,* 330 U.S. 1 (1946), where the State paid students' carfare to go to parochial schools (with the possibility of reimbursement for carfare for others who went to non-public schools), this Court held there was no establishment but rather assistance of freedom of choice. See for a fuller analysis, Weiss, *Privilege, Posture and Protection: "Religion" in the Law,* 73 Yale 593 (1964) at 612-618. *A fortiori,* payment for chosen visits characterized by some as "religious" as one among many healing alternatives cannot be conceived of as an establishment of religion. Instead, to deny her benefits because she followed her religion is unconstitutional. *Sherbert* v. *Verner, supra.*

Finally, the Constitution compels a statutory interpretation. "Medical assistance" must include healing by Christian Science, for to exclude it would violate the Constitution. (The dissent suggests indeed the State could

license practitioners and nurses for reimbursement (A-95-96).) Such a reading, coupled with the statutory requirement giving recipients a "free choice of providers," mandates payment to Miriam Winters for her Christian Science treatment.

CONCLUSION

For the reasons stated above this Court should note jurisdiction and accept the case for oral argument.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, individually and on behalf of all other persons similarly situated,	:	CLASS ACTION
Plaintiff,	:	COM-
- against -	:	PLAINT
ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services; and JAMES R. DUMPSON, individually and as Commissioner of the New York City Department of Social Services,	:	Civil Action 74 C 4402
Defendant.	:	

I.

PRELIMINARY STATEMENT

1. Plaintiff is a follower of the beliefs and practices of the First Church of Christ Scientist and as such eschews conventional medical treatment when she is ill, in preference for treatment approv-

ed by the Christian Science Church.

2. Plaintiff is presently a recipient of Supplemental Security Income and is therefore eligible for medical assistance to the needy (Medicaid).

3. Plaintiff has been ill periodically throughout the past year; to treat these illnesses, she has consulted the services of Christian Science practitioners and nurses, all of whom are listed and certified by the First Church of Christ Scientist of Boston, Massachusetts. Plaintiff's request to the New York State Department of Social Services to pay the bills incurred for these services have been denied by defendants on each occasion, on the grounds that New York Social Services Law §365-a does not authorize payment for Christian Science treatments in its definition of the character and adequacy of medical assistance.

4. Plaintiff seeks to have this Court declare invalid and enjoin defendants' refusal to pay for Christian Science treatments since this denial unconstitutionally interferes with plaintiff's free exercise of religion and violates federal regulations.

II.

JURISDICTION

5. Jurisdiction is conferred on this Court by 28 U.S.C. §1343 and §1331. The matter in controversy exceeds in value, exclusive of interests and costs, $10,000.

6. Plaintiff's action for declaratory and injunctive relief, and for damages, is authorized by 28 U.S.C. §§2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judg-

ments, and by 42 U.S.C. §1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III.

THREE-JUDGE COURT

7. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281, 2284, since plaintiff seeks an injunction to restrain defendants, who are state officers, from the enforcement, operation and execution of a state statute (New York Social Services Law §365-a) and state-wide practices on the ground that said statute and state-wide

practices are contrary to the Constitution of the United States.

IV.

PLAINTIFF

8. Plaintiff MIRIAM WINTERS is a citizen of the United States and of the State of New York. She resides at Hotel St. George, 51 Clark Street, Brooklyn, New York. She is 64 years of age, lives alone, and is not employed. Plaintiff's sole source of income is Supplemental Security Income, amounting to three-hundred nineteen dollars and twenty-five cents ($319.25) per month.

V.

CLASS ACTION

9. The named plaintiff brings this action on her own behalf and pursuant

to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated are those persons who follow the practices and beliefs of the Christian Science religion, which beliefs require them to use the Services of Christrian Science practitioners rather than conventional "medical" practitioners when they are ill and who would be entitled to medical assistance benefits for such services but for the application of the illegal statute challenged by this law suit. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party will fairly and

adequately protect the intersts of the class; and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VI.

DEFENDANTS

10. Defendant ABE LAVINE is the Commissioner of the New York State Department of Social Services and is charged by New York Social Services Law §34 with responsibility for the administration and executive functions of the State Department of Social Services. His office is located at 2 World Trade Center, New York, New York.

11. Defendant JAMES R. DUMPSON is the Commissioner of the New York City Department of Social Services and is charged by New York Social Services Law §77 with the responsibility for the administration and executive functions of the New York City Department of Social Services. His office is located at 250 Church Street, New York, New York.

VII.

12. Since January 1, 1974, plaintiff MIRIAM WINTERS' sole source of income has been Supplemental Security Income, a program of assistance to the aged, blind and disabled, which is jointly funded by federal and state governments, and which is administered by the state, pursuant to Title XVI of the Social Security Act. Prior to January 1, 1974, plaintiff received

public assistance from the State of New York. As a recipient of either type of public assistance, plaintiff is eligible for medical assistance benefits (Medicaid), as needed.

13. For more than twelve years, plaintiff has been a follower of the beliefs and practices of the First Church of Christ Scientist. As such, she does not believe in using the services or treatments of the traditional medical profession as practiced by physicians and nurses licensed to practice in New York State. She believes that any illness she may have can be effectively cured by the religious treatments administered by Christian Scientist practitioners and nurses. This practice of eschewing conventional "medical" treatment is among the most fundamental tenets of the Christian Science faith.

14. Plaintiff has been ill periodically throughout the past year. During each period of illness, she has sought the services and treatments of Christian Science practitioners or nurses, all of whom are listed and certified by the First Church of Scientist of Boston, Massachusetts.

15. Upon being billed for these services, plaintiff, by her attorney, has submitted such bills to the New York City Department of Social Services requesting payment thereof by the Medicaid program. On each occasion, these requests have been denied by defendants' agents or employees in the Department of Social Services. After each denial of payment, plaintiff requested and received a fair hearing pursuant to New York Social Services Law §366-a and §§358, et seq., of the New York Codes, Rules, and Regulations, to appeal the

Department's denial of Medicaid payment of Christian Science treatments.

16. The first such request was made in a letter dated November 12, 1973, attached hereto as Exhibit A. In response to this letter, W. W. Kass, acting on behalf of the City of New York, rejected plaintiff's request for payment by Medicaid of bills totalling $78.66, for treatments and supplies plaintiff received from a Christian Science nurse. This letter is attached hereto as Exhibit B. A fair hearing to review this denial was held on December 18, 1973. The Decision After Hearing, rendered on February 20, 1974, affirmed the Department's denial of such payments on the ground that payment was not authorized by New York Social Services Law §365-a. Attached hereto as Exhibit C is a copy of this decision.

17. Plaintiff then appealed to the New York State Supreme Court for the County of New York, pursuant to Article 78 of the New York Civil Practice Law and Rules. Pursuant to the state's motion, this appeal was transferred by that court to the Appellate Division, First Department, where is is currently pending. Furthermore, the state expressed the position that plaintiff's challenge to the constitutionality of Medicaid's denial of payments for Christian Science treatments should be in federal, rather than state, court. (Page F of Respondent State Commissioner's Memorandum of Law in Support of Answer.)

18. The second request for payment by Medicaid of Christian Science treatments totalling $90.00 was made in a letter dated December 21, 1973, attached hereto as Exhibit D. When defendants failed to respond to this request,

plaintiff requested a fair hearing, which was held on March 7, 1974. (Request for fair hearing is attached hereto as Exhibit E.) The Decision After Hearing, rendered on March 27, 1974, (attached hereto as Exhibit F), reversed the Department's decision and ordered it to pay the $70.00 of the $90.00 bill submitted by plaintiff. Only after defendants were threatened with a lawsuit to force compliance (see Exhibit G, attached hereto) did they comply with the Decision After Hearing, by payment of $70.00 in the first part of August.

19. The third request was made in a letter from plaintiff's attorney, dated March 1, 1974, requesting payment totalling $194.00 for Christian Science treatments rendered by Benjamin Rippe, C.S., attached hereto as Exhibit H. In a letter dated

March 7, 1974, Dr. Lee B. Reichman, on behalf of the City of New York, rejected this request, attached hereto as Exhibit I. In response to a similar letter from plaintiff's attorney, dated March 12, 1974 (attached hereto as Exhibit J), Phillip A. Roos, on behalf of the Bureau of Medicaid, rejected the request in a letter dated March 21, 1974 (attached hereto as Exhibit K).

20. A fair hearing to review these denials was held on May 9, 1974. The Decision After Hearing, rendered on May 30, 1974, affirmed the Department's denial of payment on the ground that New York Social Services Law §365-a does not include services rendered by a Christian Science practitioner. Attached hereto as Exhibit L is a copy of this decision. Article 78 proceedings to appeal this determination in New York State Supreme Court are currently being

initiated by plaintiff.

20. Plaintiff made a fourth request for payment of Christian Science treatments amounting to $56.00 in a letter to both Dr. Lee B. Reichman and Phillip A. Roos. As of the date this complaint was filed in this Court, defendants had failed to answer this letter.

21. Since that time, plaintiff has incurred additional bills totalling $33.00 for Christian Science treatments, attached hereto as Exhibit M. In light of plaintiff's experience with defendants' repeated denial of Medicaid payments, plaintiff has made no request for payment of this bill and has instead initiated the instant proceeding in this Court.

22. By reason of defendants' application to plaintiff of the statute challenged herein, plaintiff has been, and continues to be, deprived under

color of state law of her constitutional right to freedom of religion. Denial of Medicaid benefits to otherwise eligible Christian Scientists who seek the religious treatments of Christian Science practitioners effectively penalizes them for the free exercise of their constitutional liberties, in violation of the First and Fourteenth Amendments to the United States Constitution.

VIII.

FIRST CLAIM

23. Federal regulations relating to federal financial participation in state medical assistance programs provide for federal reimbursement of Medicaid payments to Christian Science practitioners and nurses who are listed and certified with the First Church of Christ Scientist of Boston, Massachusetts.

24. New York Social Services Law §365-a(2) defines medical assistance as:

> ...payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfer with his capacity for normal activity or threaten some significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the department....

The list of care, services and supplies included under §365-a(2) is by its terms not an all inclusive list. The statute has nevertheless been interpreted by defendants as not authorizing payments for services rendered by Christian Science practititoners. Insofar as the statute does not explicitly authorize and mandate such payments, it both operates to deny plaintiff free exercise of religious beliefs protected by the First and Fourteenth Amendments, and is therefore un-

constitutional and also violates the federal regulations.

IX.

SECOND CLAIM

25. Title 45, §249.11 of the Code of Federal Regulations provides as follows:

> A state plan for medical assistance under Title XIX of the Social Security Act must provide that any individual eligible for medical assistance under the plan may obtain the services available under the plan from any institution, agency, pharmacy, or practitioner... which is qualified to perform such services....

Insofar as defendants have refused to extend Medicaid coverage to qualified Christian Science practitioners, they have inhibited plaintiff's right to free choice of providers of medical services, and have therefore violated this federal regulation.

X.

THIRD CLAIM

26. Title 18, §360.29 of the New York Codes, Rules, and Regulations provides that departmental regulations for medical care and health services furnished pursuant to the New York Social Services Law

> ...shall include the right of each individual entitled thereto to obtain such medical care and health services from any institution, agency, or person qualified to participate under medical assistance, if such institution, agency or person undertakes to provide him such medical care and health services. 360.29 Free choice by recipient guaranteed.

Insofar as defendants have refused to extend Medicaid coverage to qualified Christian Science practitioners, they have inhibited plaintiff's free choice of medical care and services, and have therefore violated this state regulation.

Under its pendent jurisdiction, this court has authority to order compliance with this state regulation.

29. Plaintiff and members of her class have suffered and continue to suffer grievous and irreparable injury by reason of defendants' application and enforcement of the illegal and unconstitutional statute challenged herein. Plaintiff has no adequate remedy at law available to her. Plaintiff has exhausted her administrative remedies.

XI.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays on her own behalf, and on behalf of all those similarly situated, that this court:

1. assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. §§2281 and

2284 to determine this controversy, and set this case down promptly for a hearing;

2. determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

3. pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. §§2284(3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff by refusing to grant her Medicaid benefits in the amount to which she is entitled and that would otherwise be available to her except for the fact that she exercises her constitutional right to freedom of religion by seeking the

services of Christian Science practitioners when she is ill, and utilizes the free choice provisions of the federal and state regulations; and further ordering defendants to pay plaintiff $431.66, expenses for Christian Science treatments which she has incurred to date, plus interest at 6% for each portion when rendered;

4. enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that New York Social Services Law §365.2 is invalid on the grounds that it is violative of the First and Fourteenth Amendments to the Constitution of the United States and of Title 45, §249.11 of the Code of Federal Regulations;

5. enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure,

enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant to plaintiffs and all persons similarly situated Medicaid benefits in the amount to which they are otherwise entitled solely on the grounds that they have sought the treatments of Christian Science practitioners when they have become ill;

6. order the defendants, their successors in office, agents and employees, to notify promptly by first class mail at their last known address all persons who have been denied Medicaid because of the provisions enjoined herein that they are now eligible for such benefits and may reapply;

7. pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow

plaintiff's costs herein, punitive damages in the sum of $50,000, and also grant her and all persons similarly situated, such additional or alternative relief, including payment of all monies wrongfully withheld, as may seem to this court to be just, proper, and equitable.

Respectfully submitted,

JONATHAN A. WEISS, Esq.
Attorney for Plaintiff
Legal Services for the
Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

Dated: New York, New York

1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MIRIAM WINTERS, individually and on behalf of all other persons similarly situated,

Plaintiff,

- against -

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services; and JAMES R. DUMPSON, individually and as Commissioner of the New York City Department of Social Services,

Defendants.

74-C-1703

----------x

Appearances:

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BARTELS, District Judge

Plaintiff sues certain officials of the City of New York and New York State for declaratory and injunctive relief as well as compensatory and punitive damages for the wrongful denial of certain "Medicaid"

benefits under New York Social Welfare Law §365-a(2) (McKinney's Supp. 1974-75). She claims to be a follower of the beliefs and practices of the First Church of Christ, Scientist, and as such does not believe in using the services and treatments of medical doctors, but instead believes that any illness she may have can be effectively cured by religious treatments administered by certain Christian Science practitioners and nurses not licensed by the State as medical doctors and nurses. On four different occasions plaintiff has sought with differing results reimbursement under the New York State Medicaid program for treatments rendered by Christian Science practitioners. The first such application was denied and administrative appeals were exhausted without success. An appeal under Article 78 of the N.Y.C.P.L.R. was then filed and is

currently pending in New York State Supreme Court, Appellate Division, First Department. Inconsistently enough, a second application for payment was initially denied by the State Department of Social Services but was subsequently granted after a hearing. A third application was denied and unsuccessfully appealed administratively, and another Article 78 proceeding with respect to it is currently pending in the State court. Plaintiff has since made still another application for payment which has not yet been acted upon.

Plaintiff claims that defendants' application of §365-a(2) of the New York Social Welfare Law to deny her benefits constitutes a violation of her First Amendment right to freedom of religion and in addition, violates certain Federal and State regulations. Since the action seeks an injunction against the

enforcement of a statute of statewide application on the ground of its unconstitutionality, both plaintiff and defendants seek to invoke a three-judge court under the provisions of 28 U.S.C. §§2281 and 2284.

It is plain that the complaint raises a substantial constitutional issue under Sherbert v. Verner, 374 U.S. 398 (1963), and that this Court has jurisdiction under 28 U.S.C. §1343(3)(4). However, plaintiff not only claims unconstitutional application of the statute but also violation of certain State and Federal regulations, 45 C.F.R. §249.20 and Title 18, §360.29, New York Codes Rules and Regulations. Ordinarily, if the matter could be disposed of by an adjudication that the rules and regulations have been violated by defendants' application of §365-a(2) of the New York Social Welfare Law, the necessity

for convening a three-judge court could be avoided since a single judge could make this determination. Hagans v. Lavine, 415 U.S. 528, 543-45 (1974). In view of the fact that in the Court's opinion the State and Federal regulations do not require reimbursement for Christian Science treatment but instead leave the matter of determining what persons and institutions are qualfied for reimbursement to State law as administered by State officials, such an adjudication will in all likelihood not obviate the need for a three-judge court to determine the constitutionality of the application of the statute in this case. Consequently, that possibility must be rejected and a three-judge court must be convened.

It is possible that since there is an Article 78 proceeding pending in State Court, abstention under the doctrine of

Texas Railroad Commissioners v. Pullman Co., 312 U.S. 496 (1941), may be appropriate. However, any decision on this point must be and hereby is reserved for the panel. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Bjarsch v. DiFalco, 300 F.Supp. 960, 968 (S.D.N.Y. 1969).

This leaves only the question of the certification of the plaintiff as a proper representative of all those who follow the practices and beliefs of the Christian Science religion and who would be entitled to Medicaid benefits. Plaintiff, in addition to seeking money damages for herself, seeks injunctive and declaratory relief on behalf of the proposed class. Certification is opposed by defendants on the ground that the rights plaintiff is seeking to vindicate will be protected by a declaratory judgment and individual relief. We need not

reach this question in view of the fact that certification is also opposed by amicus curiae on the ground that plaintiff is an improper class representative.

Plaintiff seeks to represent the First Church of Christ, Scientist, and all of its members. But the First Church of Christ, Scientist, of Boston, Massachusetts has appeared as amicus curiae and has shown through an affidavit of an authorized church official, that it is against church policy for practitioners to seek payment or reimbursement out of public funds and that plaintiff's position is in violation of and contrary to the official policy, practices and beliefs of the church. In response to the Church's affidavit, plaintiff has submitted an affidavit by another person claiming to be a member of the First Church of Christ, Scientist, who intends to seek reimbursement for medical care received from

DECISION TO CONVENE 3-JUDGE COURT

Christian Science practitioners and nurses. It is not clear from her affidavit whether or not she is a New York resident eligible for such reimbursement by defendants. Plaintiff has failed to demonstrate that there are any other persons in similar circumstances. In such a context it follows that she may not speak for all members of the First Church of Christ, Scientist.

Since plaintiff has not demonstrated that she represents the class she seeks to represent or, in fact, that those she may represent are so numerous that joinder will be impracticable, the motion for class certification is denied and a three-judge court will be invoked.

SO ORDERED

Dated: Brooklyn, New York
September 15, 1975

/s/ JOHN R. BARTELS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, individually and on behalf of all other persons similarly situated, Plaintiff,	
-against-	74-C-1703 Three-Judge Court
ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services; JAMES R. DUMPSON, individually and as Commissioner of the New York City Department of Social Services, Defendants.	

Appearances:

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Scientist in Boston, Massachusetts
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A. LAWRENCE ABRAMS, ESQ.
EUGENE E. PECKHAM, ESQ.
Of Counsel

Before HAYS, Circuit Judge, and BARTELS and DOOLING, District Judges.

BARTELS, D.J.:

Plaintiff Miriam Winters, a follower of the beliefs and practices of the First Church of Christ, Scientist

("the Church"), although not a member, does not believe in employing the services and treatments of medical doctors and nurses, but instead that any illness can be effectively cured by religious treatments administered by certain Christian Science practitioners and nurses approved by the Church whether or not licensed by the State of New York. She brings this civil rights action against the Commissioner of the New York State Department of Social Services and the Commissioner of the New York City Department of Social Services for declaratory and injunctive relief as well as compensatory and punitive damages for the wrongful denial to her of certain "Medicaid" benefits under the New York Social Services Law ("SSL") §365-a(2) (McKinney's Supp. 1975-76,[1/] claiming, among other

things, an unconstitutional application of the statute. The basis for her claim is that such denial (a) deprives her of her First Amendment right of freedom of religion in violation of 42 U.S.C. §1983,[2] (b) violates 45 C.F.R. §249.10 (b)(17)[3] authorizing reimbursement for Christian Science nursing and sanitoria services, and (c) violates 18 New York Code, Rules and Regulations §360.29[4] guaranteeing a recipient free choice of medical care and health services. Upon plaintiff's petition, a substantial constitutional question having been presented, a three-judge court was invoked, the District Court denying class certification. Jurisdiction is based on 28 U.S.C. §§1331, 1343, 2[illegible] and 2202. At the same time the Court assumes pendent jurisdiction of the claims specified in (b) and (c) above. Florida Lime and Avocado

Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960). From the briefs and arguments the undisputed facts appear to be as follows.

FACTS

Prior to January 1, 1974, plaintiff was the recipient of income assistance from the State of New York and since that date has been the recipient of income from the Supplemental Security Income program jointly funded by federal and state governments and administered by the State of New York pursuant to the provisions of 42 U.S.C. §§1381-85. As a recipient of such assistance she was eligible for and entitled to medical assistance benefits of the federal and state Medicaid programs as provided in 42 U.S.C. §§1395-96(i), 45 C.F.R. §§249.10 et seq. and SSL §§363-69. In accordance

with her beliefs plaintiff has, on four different occasions, incurred expenses for services of Christian Science nurses and practitioners and in each instance sought reimbursement from the New York City Department of Social Services ("City Department") pursuant to the New York Medicaid program, with the following results:

(1) Her first demand was made on November 12, 1973, for expenses incurred for nursing care in the amount of $78.66 and was initially denied by the City Department on November 19, 1973, which denial was affirmed by the Commissioner of the State Department of Social Services ("State Department") on February 20, 1974, on the ground that there was no provision in §365-a(2) of the SSL authorizing such reimbursement.

Upon appeal to the Supreme Court of the State of New York, Appellate Division, First Department, pursuant to Article 78 of the N.Y.C.P.L.R.,[5] the denial was affirmed on October 16, 1975.[6]

(2) The second demand was made on December 21, 1973, for the amount of $70.00 incurred for services of a Christian Science practitioner. Initially her claim was denied by the City Department after a hearing on March 7, 1974. Thereafter the State Department determined on March 27, 1974 that plaintiff was entitled to reimbursement in the amount of $70.00.

(3) The third demand was made on March 1, 1974, for reimbursement of $194.00 paid for the services of a Christian Science practitioner and

was denied by the City Department on March 21, 1974, which denial was affirmed by the State Department on the ground that §365-a of the statute did not list the services of a Christian Science practitioner as reimbursable. An Article 78 proceeding was instituted to appeal this decision in the Supreme Court of the State of New York, Appellate Division, First Department, which proceeding is still pending.

(4) A final demand was made for the amount of $56.00 incurred for services of a Christian Science practitioner, which demand remained unanswered at the time of filing this complaint.

I

FIRST AMENDMENT RIGHTS

To determine whether plaintiff has been deprived of her First Amendment rights, a brief reference to the framework of the applicable federal and state statutes is appropriate. By means of the Federal Social Security Law, 42 U.S.C. §§1396 et seq., the United States has made federal funds available to states which adopt an approved plan for medical assistance to needy families. Requirements for approval of such plans are set forth in 45 C.F.R. §249.10 and include both mandatory and optional provisions for the type of benefits to be made available by the state to qualifying individuals and families. Pursuant to these federal laws, the State of New York enacted Title II of the SSL §§363-69 (McKinney's 1976)

including §365-a which plaintiff herein attacks. Section 365-a outlines the character and nature of "medical assistance" reimbursable under the State Medicaid program by defining the term "medical assistance" and then listing types of care, services and supplies which are included in but not limited by that term. Nowhere in either the definition or the list, however, is there any specific reference to the services of Christian Science practitioners or nurses.

Plaintiff argues that the list in §365-a(2) is not exclusive but that Christian Science healing services of practitioners and nurses are included in the term "medical assistance" as therein defined. The thrust of her constitutional claim is that the denial to her of such reimbursement forces her to choose between,

on the one hand, the pursuit of her religious beliefs as to healing and care and, on the other hand, compromising or abandoning those religious beliefs and resorting to medical assistance and care furnished by tratidional medical practitioners and nurses licensed by the State of New York.

After consideration of the facts we find it unnecessary to reach the merits of plaintiff's constitutional claim for reimbursement of sums paid for services of either Christian Science nurses or practitioners on the ground that the application of the doctrine of res judicata bars the former claim and the application of the doctrine of abstention requires the Court to stay its hand as to the latter claim.

A. Nursing Claim

Plaintiff appealed the denial to her of reimbursement for the nursing claim in an Article 78 proceeding before the Appellate Division of the Supreme Court of the State of New York. This appeal resulted in the affirmance of that denial on October 16, 1975. Thus the issue presented is whether plaintiff is now collaterally estopped by the doctrine of res judicata from asserting her constitutional attack on that denial in this subsequent action. In applying res judicata principles it is necessary to decide in the first instance whether they are generally applicable in a §1983 proceeding, an issue not raised by the parties, and in the second instance whether New York courts give their prior Article 78 adjudications res judicata effect since this Court is not bound to give any

greater res judicata effect than the state court itself. This is a question of state and local law. See St. John v. Wisconsin Employment Relations Board, 340 U.S. 411 (1951); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Union and Planters' Bank v. Memphis, 189 U.S. 71 (1903); McCune v. Frank, 521 F.2d 1152 (2d Cir. 1975).

The first question raises the issue of whether res judicata may be applied in any §1983 proceeding. In Preiser v. Rodriguez, 411 U.S. 475, 497 (1973), the United States Supreme Court noted that a number of lower courts have assumed that the doctrine of res judicata is fully applicable in such cases, three dissenting justices noting that such a conclusion might be error. But in fact the doctrine has been fully applied in Coogan v. Cincinnati Bar Association,

431 F.2d 1209, 1211 (6th Cir. 1970); Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965); Rhodes v. Meyer, 334 F.2d 709, 716 (8th Cir. 1964); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963). While treating the problem more as one of waiver rather than as res judicata, the Second Circuit has stated by way of dicta that where the constitutional issue has actually been raised and litigated in a state proceeding, such as an Article 78 proceeding, the litigant has waived that issue and cannot raise it in a subsequent civil rights action. Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975). The court, however, made it clear that the doctrine would not be applied to a §1983 litigation simply because the litigant had a full

opportunity to raise the issue but in fact failed to do so. See Newman v. The Board of Education, 508 F.2d 277 (2d Cir.), cert. denied, 420 U.S. 1004 (1975); Thistlewaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Montagna v. O'Hagen, 402 F.Supp. 178 (E.D.N.Y. 1975).

As to the second question we are reminded of Judge Smith's remark in McCune v. Frank, supra at 1156, that:

> "In Civil Rights Act cases such as this, brought under 42 U.S.C. §1983, the policy of favoring the federal forum, Mitchum v. Foster, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed. 2d 705 (1972), should make us especially careful to ascertain precisely what effect the state courts would give to their own prior judgments." (Footnote omitted).

Under New York law a final judgment on the merits in an Article 78 proceeding is conclusive as to the rights of all parties, or their privies, to the

litigation with respect to all issues actually raised and litigated even if not decided by the court.[7] See generally 9 Carmody Wait 2d §§63:196-63:240 (1966). Island Park Taxpayers & Property Owners Association, Inc. v. Sacino, 42 App.Div.2d 729, 345 N.Y.S.2d 664 (2d Dep't 1973). Since plaintiff's prior Article 78 proceeding involved the identical parties to the present action, the only question is whether plaintiff, in that proceeding, actually raised and litigated her identical constitutional claim with regard to §365-a of the SSL.

To raise the constitutional issue in the prior state court proceeding it is not sufficient for the litigant to merely mention it in passing but he must elaborate upon that claim with supporting citations of authority so that there can be no doubt that it was fully litigated.

Newman v. The Board of Education, supra. In this case we find that plaintiff's nursing claim of unconstitutionality was clearly and explicitly submitted to the Appellate Division, First Department, in her prior Article 78 proceeding.[8]

Therefore, we conclude under the principles of res judicata applicable by the federal forum to a §1983 action and by the New York courts to a prior Article 78 proceeding that plaintiff is barred from raising her constitutional claim for nursing services in this court. Obviously, her remedy from the adverse ruling by the Appellate Division was by appeal to the New York Court of Appeals.

B. Practitioner Claims

In the present case the plaintiff made three separate claims for reimbursement for services of a Christian Science

practitioner. The first was granted by the Department of Social Services; the second was denied, and the third is still pending. Concerning the second claim, as above noted, plaintiff instituted an Article 78 proceeding in the Appellate Division of the State Supreme Court to review the adverse administrative action. Referring to both the second and third claims, defendants have accordingly urged this Court to invoke the doctrine of abstention. The federal courts, of course, have the duty "to guard, enforce, and protect every right granted or secured by the Constitution of the United States...", Robb v. Connolly, 111 U.S. 624, 637 (1884), and this duty cannot be evaded by relegating the plaintiff to the state court or by any doctrine of exhaustion. Zwickler v. Koota, 389 U.S. 241 (1967); McNeese v.

Board of Education for Community School Board District 187, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1960); Stapleton v. Mitchell, 60 F. Supp. 51 (D.Kans. 1945). The Supreme Court in Zwickler pointed out that "...abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim."

As recently held by this Circuit in McRedmond v. Wilson, Docket No. 75-7389, Slip op. 1739 (2d Cir. Feb. 2, 1976), this jurisdictional precept is particularly applicable in civil rights actions under §1983. However, in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941), the Supreme Court also recognized that there are exceptional occasions where the doctrine of abstention is brought into

play in the interest of state and federal harmony, where a state court's interpretation of a complex and unclear state statute may settle by appropriate action, the issue involved without any need to raise or decide the constitutional question. See Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Zwickler v. Koota, supra, 389 U.S. at 248. To invoke this narrow exception of abstention, there are, according to the authorities, three conditions precedent: (1) the state statute must be unclear or its interpretation uncertain; (2) the resolution of the constitutional issue must depend upon the interpretation of the state law; and (3) the state law must be susceptible to an interpretation which would avoid the federal constitutional issue. See McRedmond v. Wilson, supra.

With these principles in mind, we note that there has already been contradictory action taken by the State Department regarding two identical claims for reimbursement of practitioner's services and that there are no New York cases interpreting §365-a of the SSL concerning its inclusion or exclusion of reimbursement for the services of a Christian Science practitioner. We are thus faced with a statute whose meaning is unclear upon this issue. The language of §365-a demonstrates that it is susceptible to an interpretation permitting reimbursement for Christian Science practitioner's services even if predicated upon a religious belief, inasmuch as the term "medical assistance" is broadly defined and the specific items listed to be included within that definition indicate that it is a non-

exclusive list. In fact, such a ruling by the New York courts is not unlikely since the State Department has already made such a ruling on one occasion. In the New York court in the Article 78 proceeding now pending interprets the statute favorably to the plaintiff to include reimbursement for practitioner's services, then the constitutional issue will be completely avoided. Accordingly, we believe this case to be an appropriate one for the application of the doctrine of abstention. Boehning v. Indiana State Employees Association, Inc., 96 S.Ct. 168 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970); Meridian v. Southern Bell Telephone & Telegraph Co., 358 U.S. 639 (1959); Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975); Askew v. Hargrave, 401 U.S. 476 (1971); Field,

Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, U.Pa.L.Rev. 1071 (1974).

We, therefore, will abstain temporarily from passing upon the federal constitutional question with respect to the practitioner's rights but will retain jurisdiction in the event that the state court's interpretation of the statute fails to avoid the federal constitutional question in which event the plaintiff will be entitled to return to this Court for adjudication of that issue.[9/]

II

VIOLATION OF FEDERAL REGULATIONS

Aside from her constitutional challenges to §365-a of the SSL, plaintiff also asserts that the denial to her for reimbursement for both Christian Science nursing care and Christian Science

practitioner services violates the Federal Regulations in 45 C.F.R. §249.10(b)(17)(ii) and (iii)[10] which she maintains recognize her entitlement to reimbursement. Accordingly, she argues that the State of New York is therefore required to provide such reimbursement in its Medicaid plan. Plaintiff's interpretation of §249.10(b)(17)(ii) and (iii) of the Federal Regulations is patently incorrect. That section only states that "any other medical care and any other type of remedial care recognized under State law"[11] may be reimbursed and subsection (ii) thereof includes in such possibilities "services of Christian Science nurses" but makes no mention of the services of a Christian Science practitioner. Moreover, since

this section is merely permissive and not mandatory upon the participating states, the regulation itself cannot be violated if the state pursuant to its option excludes such reimbursement from its Medicaid plan.[12] 45 C.F.R. §249.10(a).

III

VIOLATION OF THE NEW YORK STATE REGULATIONS

Finally we come to plaintiff's claim that the denial to her of reimbursement for both nurses and practitioners claims violates her right to free choice of medical care and services as guaranteed by 18 N.Y. Code, Rules and Regulations §360.29.[13] In this claim plaintiff has merely rephrased the essence of her constitutional claim with regard to New York's failure to include the services of Christian Science

nurses and practitioners within the definition of reimbursable "medical assistance" as set out in §365-a of the SSL. While the heading of §360.29 reads "free choice by recipient guaranteed," that reference is to the medical care and health services provided for in Title 11 of the SSL and limits medical care and services to those "qualified" to participate under "medical assistance." It has already been demonstrated that the New York Medicaid plan does not recognize or expressly provide for reimbursement for services rendered by Christian Science practitioners and nurses. In other words, such services are not within the category of remedial services from which she is entitled to make a choice. Consequently, she has not been denied a free choice of medical care

and services guaranteed by the New York regulations. For these reasons we must deny plaintiff relief on the basis of 18 N.Y. Code, Rules and Regulations §360.29.

CONCLUSION

We deny all requested relief except insofar as it pertains to plaintiff's claim for reimbursement for practitioners services predicated upon a constitutional challenge to the state statute. As to that claim we presently abstain retaining jurisdiction to decide the constitutional issue after the New York courts have interpreted §265-a of the SSL.

SO ORDERED.

Dated: July 21, 1976.

/s/
Paul R. Hays, U.S.C.J.

/s/
John R. Bartels, U.S.D.J.

OPINION

John F. Dooling, Jr.,
U.S.D.J.

FOOTNOTES

1/ Section 365-a of the SSL provides:

"1. The amount, nature and manner of providing medical assistance for needy persons shall be determined by the public welfare official with the advice of a physician and in accordance with the local medical plan, this title, and the regulations of the department.

2. 'Medical assistance' shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the department. Such care, services and supplies shall include, but need not be limited to:

(a) services of qualified physicians, dentists to the extent authorized by paragraph (e) herein, nurses, optometrists, podiatrists and other related professional personnel;

(b) care, treatment, maintenance and nursing services in hospitals, nursing homes, infirmaries or other eligible medical institutions, and health-related care and services in intermediate care facilities, while operated in compliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provision thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in hospitals located without the state; provided, however, that care, treatment, maintenance and nursing services in nursing homes, including those operated by the state department of mental hygiene or any other state department or agency, shall be limited to one hundred days during any spell of illness for persons who are receiving or are eligible for medical assistance under provisions of subparagraph four of paragraph (a) of subdivision one of section three hundred sixty-six of this chapter, plus, with the prior approval of the commissioner of health upon the recommendation of the appropriate medical director, or with the prior approval of the commissioner of mental hygiene in the case of nursing homes operated by the state department of mental hygiene, such additional periods of time as may be necessary in cases of clear need for nursing services;

(c) out-patient hospital or clinic services in facilities operated in compliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provisions thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in any hospital located without the state;

(d) home health care services, including home nursing services and services of home aids and homemaker or housekeeping services in the recipient's home, if rendered by an individual other than a member of the family who is qualified to provide such services, where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a registered nurse;

(e) preventive, prophylactic and other routine dental care, services and supplies;

(f) drugs, sickroom supplies, eyeglasses, and prosthetic appliances except dental prosthetic appliances; provided however that dental prosthetic and orthodontic appliances required to alleviate a serious health condition, including one which affects employability, may be furnished with prior approval in accordance with the regulations of the department.

(g) physical therapy and relative rehabilitative services;

(h) laboratory and x-ray services;

(i) transportation when essential to obtain care and services in accordance with this section, upon prior approval, except in cases of emergency.

(j) care and services furnished by a comprehensive health care organization to eligible individuals residing in the geographic area served by such organization, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

3. Any inconsistent provisions of this section notwithstanding, medical assistance shall include:

(a) early and periodic screening and diagnosis of eligible persons under six years of age and, in accordance with federal law and regulations, early and periodic screening and diagnosis of eligible persons under twenty-one years of age to ascertain physical and mental defects; and

(b) care and treatment of defects and conditions discovered by such screening and diagnosis

including such care, services and supplies as the commissioner shall by regulation require to the extent necessary to conform to applicable federal law and regulations.

(c) family planning services and supplies for eligible persons of childbearing age, including children under twenty-one years of age who can be considered sexually active, who desire such services and supplies, in accordance with the requirements of federal law and regulations and the regulations of the department. No person shall be compelled or coerced to accept such services or supplies."

2/ The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3/ The pertinent portions of Section 249.10(b)(17) of 45 C.F.R. provide as follows:

"(17) Any other medical care and any other type of remedial care recognized under State law and specified by the Secretary - This term includes the following items in those States in which they are recognized under State law and

under the circumstances, and to the extent to which, they are so recognized:

***

(ii) Services of Christian Science nurses who are listed and certified by the First Church of Christ Scientist, Boston, Mass., when these services have been requested by the patient and are provided (A) by, or under the supervision of, a Christian Science visiting nurse organization lsited and certified by the First Church of Christ Scientist, Boston, Mass.; or (B) as private duty services to and [sic] individual in his own home or in a Christian Science sanatorium operated or listed and certified, by the First Church of Christ Scientist, Boston, Mass., when the patient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the sanatorium.

(iii) Care and services provided in Christian Science sanatoria operated by, or listed and certified by, the First Church of Christ Scientist, Boston, Mass."

4/ Section 360.29 of 18 N.Y. Code, Rules and Regulations provides:

"Free choice by recipient guaranteed. [Additional statutory

authority: Social Services Law, §363-a; L. 1971, ch. 110, §83] Medical care and health services furnished pursuant to title 11 of the Social Services Law shall be provided in accordance with regulations of the department and provisions of contracts entered into between the department and the Department of Health pursuant to section 364-a of the Social Services Law, which regulations and contracts shall include the right of each individual entitled thereto to obtain such medical care and health care services from any institution, agency, or person qualified to participate under medical assistance, if such institution, agency or person undertakes to provide him such medical care and health services."

5/ An Article 78 proceeding, §§7801-7806 of the N.Y.C.P.L.R., is a special proceeding under New York law, the purpose of which is to provide a means for reviewing an action or determination by a public body or officer.

6/ See Winters v. The Commissioner of the New York State Department of Social Services, 49 App.Div.2d 843, 373 N.Y.S.2d 604, 607 (First Dep't 1975).

7/ In Lakeland Water District v. Onondaga County Water Authority, 24 N.Y.2d 400, 301 N.Y.S.2d 1, 248 N.E.2d 855 (1969), and Kovarsky v. Housing & Development

Administration of the City of New York, 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972), the New York Court of Appeals made it quite clear that it is proper for a plaintiff, in an Article 78 proceeding, to challenge the constitutionality of a state statute either on its face or as applied, although the Court of Appeals requires the Appellate Division, in the case of a facial attack in such a proceeding, to convert the action as a matter of form to one for declaratory judgment pursuant to §3001 of the CPLR. Prior to the above cases an Article 78 proceeding was held to be an improper vehicle for challenging the facial constitutionality of a statute and such claims were routinely dismissed and plaintiff was required to bring a second action for declaratory judgment pursuant to §3001 of the CPLR. Matter of Diocese of Rochester v. Planning Board Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956).

Under New York law a final judgment on the merits in an action pursuant to §3001 of the CPLR is conclusive against all parties to the litigation with respect to all issues actually raised and litigated even if not expressly ruled on by the court. Searles v. Main Tavern, Inc., 28 App.Div.2d 1136, 284 N.Y.S.2d 652 (2d Dep't 1967); Motor Vehicle Accident Indemnification Corp. v.

National Grange Mutual Insurance Co., 26 App.Div.2d 6, 270 N.Y.S. 2d 245 (1st Dep't 1966), affirmed, 19 N.Y.2d 115, 278 N.Y.S.2d 367, 224 N.E.2d 869 (1967).

8/ This conclusively appears from an examination of the briefs submitted by all the parties to the Appellate Division, First Department.

9/ Section 249.10(b)(6) of 45 C.F.R. denies payment for remedial care unless provided by "licensed practitioners" as defined by state law and New York law does not license Christian Science practitioners. Under the federal-state scheme of funding a federal grant could not presently be obtained by the state for such reimbursement. Nevertheless, the federal statute and regulations do not prohibit such compensation on the ground that it is the practice of religion and New York law does not preclude such compensation although it does not expressly contemplate it.

10/ See footnote 3.

11/ In People v. Cole, 219 N.Y. 98, 113 N.E. 790 (1916) the New York Court of Appeals held that a Christian Science practitioner could not be convicted of practising medicine without a license under a state statute because the practice of the profession of medicine included "treating...any human disease,

pain, injury, deformity or physical condition." See New York Education Law §6521 (Mc Kinney's 1972). Moreover, §6527 (4)(b) of the Education Law (McKinney's Supp. 1975-6) provides that the provisions of the statute requiring practitioners to be licensed "shall not be construed to affect or prevent...[t]he practice of the religious tenets of any church."

12/ The pertinent portion of 45 C.F.R. §249.10 provides:

"(a) State plan requirements. - A State plan for medical assistance under title XIX of the Social Security Act must:

(1) Specify that at least the first five items of medical and remedial care and services, as set forth in paragraph (b)(1) through (5) of this section, will be provided to the categorically needy.

(2) Specify that, if the plan includes the medically needy, at least the following items of medical and remedial care and services will be provided to the medically needy:

(i) The first five items as set forth in paragraph (b)(1) through (5) of this section; or

(ii)(A) Any seven of the items as set forth in paragraph (b)(1) through 16) of this section; and

(B) If the plan includes inpatient hospital services or skilled nursing facility services,

physicians' services to eligible individuals when they are patients in a hospital or skilled nursing facility, even though physicians' services as defined in paragraph (b)(5) of this section are not otherwise included for the medically needy."

13/ See footnote 4.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

MIRIAM WINTERS, individually and on behalf of all other persons similarly situated,

Plaintiff,

-against-

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services; JAMES R. DUMPSON, individually and as Commissioner of the New York City Department of Social Services,

Defendants.

74 C 1703

- - - - - - - - - - - - - - - - - - - x

DOOLING, D.J. (concurring in the disposition of the claim for reimbursement for nursing services, dissenting from the disposition of the claim for reimbursement for practitioners services):

A. It appears that the doctrine of the Church of Christ, Scientist, is that disease is a reality, that the Christian Science Practitioner renders a religious

service and that the cure of disease is affected by religious faith and prayer. The Court in People v. Cole, 1916, 219 N.Y. 98, 110, concluded, in effect, that a Christian Science Practitioner when acting as such, is practising the religious tenets of his Church, or that, as the practitioner in that case explained, his "treatment" was "interposition with God by prayer to take away diseases" (219 N.Y. at 108-109), and that in consequence the Christian Science Practitioner was necessarily practising medicine under the statute as it then stood (and as - substantively unchanged - it stands now) because the practice of the profession of medicine is defined to include "treating ... any human disease, pain, injury, deformity or physical condition." See Education Law § 6521. But the statute requiring medical practitioners to be licensed provided and provides that the statute "shall not be construed

to affect or prevent ... The practice of the religious tenets of any church." Education Law § 6527-4 (formerly Public Health Law § 173). Hence,the Court held, Cole could not be convicted.

Ohio, too, concluded that the Christian Science Practitioner is practising unlicensed medicine, but, in the absence of a statutory exception, held that the practitioner was not protected in doing so by his rights of religious freedom. State v. Marble, 1905, 72 Ohio St. 21, 73 N.E. 1063. Nebraska likewise has held that the Christian Science practitioner is within a statute prohibiting unlicensed practice of healing activities even if he does not come within the usual intendment of the words "practising medicine," and that he is punishable despite his rights of religious freedom. State v. Buswell, 1894, 40 Neb. 158, 58 N.W. 738.

B. The constitutional power to

exclude citizens from the practice of the healing arts unless they demonstrate their competency as measured by reasonable standards and show that they are licensed to practice that art is unquestioned; it is exemplary of appropriate exercises of the police power, Barsky v. Board of Regents, 1954, 347 U.S. 442, 449 (ignoring for present purposes, the underlying issue in Barsky); Williamson v. Lee Optical of Oklahoma, Inc., 1955, 348 U.S. 483, 487-489; Marburg v. Cole, 1941, 286, N.Y. 202; Matter of Anile v. Nyquist, 3d Dept. 1970, 34 App. Div. 2d, 1067, 312 N.Y.S. 2d 109. A practical consequence of that, ordinarily, is that unlicensed practitioners of the healing arts cannot successfully sue for their services. See Brearton v. DeWitt, 1930, 252 N.Y. 495, 500. However, since that result appears to depend on the illegality of the contract for payment, for practice without a license is a

misdemeanor, it does not imply that a Christian Science Practitioner could not sue for and recover his agreed fees: his practice is permissible although unlicensed practice of medicine. The Church of Christ, Scientist, countenances payment to Christian Science Practitioners for their services; there are qualified Church members who make a livelihood by their practice, and the Church at Boston maintains a register of them. They are considered by the Church as practising a ministry and a profession. Indeed, the Internal Revenue Service has, in a 1943 "special ruling," held that sums paid to Christian Science practitioners, nurses and sanitoria are deductible medical expenses under Section 213 of the Internal Revenue Code. See 433 CCH ¶ 6175, 1976 CCH Federal Tax Reporter at 25,100, ¶ 2019.11. The fear of frauds is hardly real: fakers are dealt with summarily. See, e.g., People v. Wendel, Kings

Co. 1946, 68 N.Y.S. 2d 267, aff'd, 2d Dept. 1947, 72 App. Div. 1067, 75 N.Y.S. 2d 302. The inference is that a New York Christian Science practitioner practising his profession in good faith could sue for and recover his agreed fees for permitted medical practice for the same reason that a minister could sue his incorporated church to recover on his contract of pastoral employment. No basis is seen on which the courts of New York could deny judicial relief.

Faced, then, with the non-frivolous costs of medical care incurred by religious communicants for purely religious therapy, the Government cannot go much, if at all, farther than to enact regulations designed and appropriate to protect health and prevent fraudulent imposition and can go only so far as to adopt measures of general application; the assertion against such regulation of a claim of religious privilege will not avail. Cf. Cantwell v.

Vogelgesang, 1917, 221 N.Y. 290, 293-294.

As in the cognate free-speech cases, to use the Court's words (United States v. O'Brien, 1968, 391 U.S. 367, 377, 388),

> "... we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Cf. United States Labor Party v. Codd, 2d Cir. 1975, 527 F.2d 118. So here, state regulation is not free to aim at either the abridgement or the establishment of this species of religious practice. As, for example, the Court held in United States v. Ballard, 1944, 322 U.S. 78, 85-88, on remand, Ballard v. United States, 9th Cir. 1945, 152 F.2d 941, 943, reversed (on an unrelated point), 1946, 329 U.S.

187, the law and the courts cannot put in issue or try the verity of religious assertions, but they can denounce and punish after trial representations that, on competent evidence, a jury finds to have been fraudulently made, even though the subject matter of the representations is a religious statement the verity of which cannot be put in issue: fraud may be in the profession of belief, an indispensible ingredient of persuasion, where there demonstrably was no real belief. Fraud only is punished, and belief is not interrogated.

A consequence of the First Amendment's bar to judicial inquiry into the truth of religious statements has been held to be that printed religious matter accompaying allegedly therapeutic devices cannot be treated as "false" labels on the devices if proof of falsity depends on inquiry into the verity of the printed religious matter. Foundation Church of Scientology v.

United States, D.C. Cir. 1969, 409 F.2d 1146. But if the devices can be shown to be inefficacious for their intended uses without inquiry into issues of the verity of religious statements, the devices can be condemned as mislabeled in failing to have adequate instructions for use. Church of Scientology v. Richardson, 9th Cir. 1971, 437 F.2d 214, 218; Church of Scientology v. Department of Health, Education and Welfare, 8th Cir. 1972, 459 F.2d 1044.

New York does not provide for the use of public funds to compensate for the practice of the healing arts if the practice is not regulated and licensed practice. A necessary and patent consequence is to deny public assistance to cover the cost of medical care where the therapeutic agent is prayer. Such direct compensation cannot be denied on the ground that because it is direct, it must tend to establish religion rather than simply avoid

abridging religious liberty. Certainly to allow payment would encourage a religious practice, but, equally, to deny compensation must inhibit or, at the least, burden the exercise of religious freedom. In simplest truth the consultation and the payment are for needed therapy, for the "medical" result. That the therapeutic agents are faith and prayer is a choice of medical means dictated by the believer's total religious creed. But actual disease is present and there is an actual need for curative intervention of a kind credible to the believing communicant of the Church. Denial of compensation must press the needy believers to forego the choice of the therapeutic means that their religious faiths dictate and to seek a substitutional therapy in what their faith condemns as misguided and inefficacious.

The State's regulations restricting public compensation for practice to

licensed and regulated practitioners can be readily supported as applied to the case of the Christian Science practitioner, however, if the effect on Christian Science and other religious practitioners does not turn on the circumstance that the practitioners employ religious practice as their therapeutic means but only upon the application of regulations addressed to serving, and appropriate to serve, the public health and other interests familiarly protected by state action.

The text of the laws and regulations governing the licensing of physicians, physicians' and specialists' assistants, chiropractic practitioners, physical therapists, dentists, pharmacists, nurses, podiatrists, optometrists, opthalmic dispensers, occupational therapists, speech pathologists and audiologists, and psychologists evinces the State's concern and provision for the physical and mental well

being of those who are or believe themselves in need of care; standards of competency and visitorial oversight are established which are intended to safeguard the public health and protect against ignorant and fraudulent practice. Against this background of wide ranging and careful licensing and regulation, the restriction of state funds available for medical assistance to those providers of medical services who are licensed, or are supervised by licensed professionals, is an expectable and appropriate as well as reasonable expression of the overall policy of the State.

The final question then is whether that policy restricts the religious freedom of Christian Scientist or simply leaves them in the class of those unlicensed persons whose systems of therapy are not regulated and licensed. Exemption from license and regulation is not the legal equivalent of being licensed and regulated. The

The denial of compensation from public funds to Christian Science Practitioners is a consequence of their unlicensed and unregulated status and is not based on affirmative action taken against the use of prayer as a therapeutic agency nor does the denial rest on any affirmative finding concerning the efficacy of prayer as a therapeutic agency. To authorize compensation would accord Christian Science practice a preference over other practices of the healing arts none of which is compensable under the State plan unless it is regulated and licensed. Cf. Kings Garden Inc. v. F.C.C., D.C. Cir. 1974, 498 F.2d 51, 55-57, 59-60; O'Brien v. United States, supra. There appears to be no reason why the state and federal governments cannot limit public compensation for therapeutic services to regulated and licensed forms of therapy provided that they do not either exclude therapies in which prayer or belief is the active agent on the ground that they are

"religious," or accord such therapy equal recognition with regulated and licensed services on the ground that the "religious" nature of the service of itself establishes an entitlement to that recognition. The governmental action here demonstrably has the requisite generality and neutrality.

C. Subchapter XIX of Title 42, United States Code, provides for Grants to States for Medical Assistance Programs (42 U.S.C. 1396 et seq.) and provides elaborate program qualification and eligibilitty standards (See, e.g., Section 1396a(a)(30), (33)(A), (34)). Section 1396d defines "medical assistance" as meaning payment of part or all of the cost of rendering to individuals the "care and services" listed in Section 1396d(a)(1)-(17). The services include

> "(5) physicians' services furnished by a physician

(as defined in section 1395x(4)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

"(6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;

"(13) other diagnostic, screening, preventive, and rehabilitative services;

"(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;"

The regulations (45 C.F.R. Parts 249-250) provide that state plans for medical assistance must provide either the care and services specified in 45 C.F.R. §249.10(b)(1) through (5), or any seven of the items set forth in §249.10(b)(1) through (16). Subdivision (b)(5) covers "Physicians' services" "provided, within the scope of practice of his profession as defined by State law, by...an individual licensed under State law to practice medicine or osteopathy." Subdivision (b)(6), a permitted but not required service, itemizes

"(6) Medical care and any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law. This term means any medical or remedial care or services other than physicians' services, provided within the scope of practice as defined by State law, by an individual licensed as a practitioner under State law."

Subdivision (b)(13)(iv) itemizes

"(13) Other diagnostic, screening preventive, and rehabilitaservices.

* * *

"(iv) "Rehabilitative services," in addition to those for which provision is made elsewhere in these definitions, include any medical remedial items or services prescribed for a patient by his physician or other licensed practitioner of the healing arts, within the scope of his practice as defined by State law, for the purpose of maximum reduction of physical or mental disability and restoration of the patient to his best possible functional level." Underscoring in (iv) added.)

Subdivision (b)(17) itemizes what would appear to be a subset of services optionally includable in a State plan but not suffic-

ing as a qualifying feature -

> "(17) Any other medical care and any other type of remedial care recognized under State law and specified by the Secretary. - This term includes the following items in those States in which they are recognized under State law and under the circumstances, and to the extent to which, they are so recognized:
>
> * * *
>
> "(ii) Services of Christian Science nurses who are listed and certified by the First Church of Christ Scientist, Boston, Mass., when these services have been requested by the patient and are provided (A) by, or under the supervision of a Christian Science visiting nurse organization listed and certified by the First Church of Christ Scientist, Boston, Mass., or (B) as private duty services to and individual in his own home or in a Christian Science sanatorium operated, or listed and certified by the First Church of Christ Scientist, Boston, Mass., when the patient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the sanatorium

> "(iii) Care and services provided in Christian Science sanatoria operated by or listed and certified by the First Church of Christ Scientist, Boston, Mass."
>
> * * *
>
> "(vi) Personal care services in a recipient's home rendered by an individual not a member of the family, who is qualified to provide such services, where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a registered nurse."

Subdivision (17)(ii) appears - pointedly? - to omit reference to supervision by a certified Christian Science Practitioner.

Section 249 of the regulations provides -

> "§ 249.20 Free choice of providers of medical services: State plan requirement.
>
> "A State plan for medical assistance under title XIX of the Social Security Act must provide that any individual eligible for medical assistance under the plan may obtain the services available under the plan from any institution, agency, pharmacy, or practitioner, including an organization which provides such services or

> arranges for their availability on a prepayment basis, which is qualified to perform such services."

The federal statute and regulations, while they reflect advertence to the existence of Christian Science practice do not prohibit its compensation on the ground that it is the practice of religion. On the contrary, if Christian Science practice were explicitly licensed in New York and compensation for it authorized under the New York plan, the federal law and regulations would, at least literally, authorize Medicaid payment for it.

D. The New York Social Welfare Law, in Article 5, Title 11 (Sections 363 et seq.) provides the state plan enacted under the federal act. Section 364 makes the State Department of Social Welfare responsible for

> "(d) reviewing, with the advice and assistance of the State department of health,

> the quality and availability of medical care and services furnished under such plans, to assure that the quality of medical care and services is in the best interest of the recipients ...."

Section 365 requires the public welfare districts to furnish "medical assistance" to the eligible persons residing in the district. Section 365-a.1. provides that the amount, nature and manner of providing "medical assistance" for the needy is to be determined by the public welfare official with the advice of a physician and in accordance with the local plan, the statute and departmental regulations.

Section 365.a.2. defines "medical assistance" as meaning "payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with [the] capacity for normal

activities ... and which are furnished an eligible person in accordance with this title and the regulations of the department." The subdivision continues -

> "Such care, services and supplies shall include, but need not be limited to:
>
> (a) services of qualified physicians ... and other related professional personnel ...."

The regulations, 18 NYCRR, Parts 500 and 505, in turn define medical care in terms of services provided by "qualified medical and related personnel" (Section 500.1), and describe the scope of medical assistance as including "services of qualified physicians ... and other related professional personnel" (Section 505.1(l). Physicians services are defined as those of licensed and currently registered practitioners who in addition meet certain continuing-education and experience standards (Section 505.2). Other definitional regulations directly or indirectly

require the use of or supervision of service by licensed practitioners or practitioners approved by medical or kindred associations (Rehabilitation Services § 505.11; podiatrists, § 505.12; family planning, § 505.13; home aid services, § 505.14(b); psychiatric care, § 505.15; radiological services, § 505.17; clinical psychological services, § 505.18; associates' and assistants' services, § 505.19).

The New York law does not preclude compensation to a Christian Science Practitioner but it cannot be said to contemplate it. The New York regulations definitely appear to exclude compensation to unlicensed practitioners. The federal statute, however, through Sub-Sections 1396d(a)(5), (6) and (17), invokes state "recognition" as a prerequisite to treating a service as compensable, or requires that the service be rendered by a "physician" and the federal regulations are strict and

explicit in requiring that the provider of the service be licensed by the state.

Thus the federal statute and regulations taken with the State plan, as set forth in the State statute and regulations, through their reciprocal action deny payment for medical assistance unless it is compromised in services of licensed professionals or personnel supervised by licensed professionals. Hence the Director of the Bureau of Medicaid in his letter of March 21, 1974, based his ruling on the grounds that the federal law and regulations do not require inclusion of the cost of Christian Science practice in the State program and that New York has not done so.

It appears that if a scheme for licensing and regulating Christian Science Practitioners were evolved and became a part of State law, a scheme that could only be based on efficacy testing under conditions of expectable efficacy and could not

be based on examination of the creed, the federal statute and regulations would not forbid the inclusion of such medical or remedial care in the State plan. The state's existing schemes of regulation and licensing all include a very significant role in each scheme for a board made up in whole or part of the class of professionals being regulated (See e.g., Education Law, §§ 6508, 6510, 6523, 7602), so that a licensing scheme covering Christian Science practitioners is not unthinkable as a matter of legislative draftmanship. That such a scheme would be essayed in the foreseeable future is unlikely in the extreme, but it is not notionally impossible that cooperative effort could produce a feasible scheme. The obstacles to the effort are many and forbidding.

The case, then, remains that the cost of the medical assistance in question has properly been denied simply because the

Christian Science practitioners' services fall within the class of unlicensed medical services which are excluded from compensation because they are unlicensed. No unpermitted effect on the exercise of a First Amendment freedom is present.

The complaint and action should therefore be dismissed on the merits.

EXHIBIT A(i)

November 12, 1973

Department of Social Services
GREENWOOD WELFARE CENTER
100 Lawrence Street
Brooklyn, New York 11201

Re: Miriam Winters
ST. GEORGE HOTEL
51 Clark Street
Brooklyn, New York 11201
AD 1479709

Dear Sir or Madam:

I enclose copies of bills on behalf of my client, Miriam Winters. These were for nursing care and incidental expenses, pursuant to an illness. Could you please issue a check to reimburse her for the total amount. Thank you very much for your attention to this matter.

Yours truly,

Jonathan A. Weiss

JAW/am
Encl.

bcc: Miriam Winters

THE CITY OF
NEW YORK

HUMAN RESOURCES ADMINISTRATION
DEPARTMENT OF SOCIAL SERVICES
Greenwood Income Maintenance
Center
100 Lawrence Street,
Brooklyn, New York 11201

19 November, 1973

re: Winters, Miriam
AD 1479709-1

Legal Services for Elderly Poor
2095 Broadway
New York, N.Y.

Dear Mr. Weiss:

In regard to the issue of reimbursement for medical related items for the above named client:

1. All medical items and services are handled thru the "Medicaide" system - no public assistance funds can be issued for such costs.

2. The "vaseline lotion", "slippers & robe" etc. would not be paid under Medicaid. D.S.S. no longer issues any supplementary clothing grants.

3. The items from Roche Surgical Co. may have been paid for by Medicaid had they been presented via a "Medicaide prescription" to the vendor.

4. Transportation costs for shopping trips, even for "medical supplies," are

not paid by D.S.S. The only such costs that may be paid (even then as an "exception to policy") are carfare to medical treatment.

Sincerely,

/s/ W. W. Kass, CSW
MSW
Medicaid (unintelligible) Consultant

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of MIRIAM WINTERS,	
From a Determination by the New York City Department of Social Services (hereinafter called the Agency).	DECISION AFTER FAIR HEARING

A fair hearing was held at Two World Trade Center, New York, New York, on December 18, 1973, before William Carr, Hearing Officer, at which the appellant's representative and representatives of the Agency appeared. The appeal is from a determination by the Agency relating to the adequacy of a grant of aid to the disabled and medical assistance authorization. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

DECISION AFTER FAIR HEARING

(1) The appellant is in receipt of a grant of aid to the disabled and medical assistance authorization.

(2) The appellant is currently receiving a shelter allowance of $140 per month. Prior to June of 1971, the appellant's shelter cost was $140 per month. From June, 1971 to February, 1973, the appellant's shelter cost was $154.20 per month. From February, 1973 to date, the appellant's shelter cost has been $160 monthly. In addition to the shelter cost paid by the appellant the appellant pays an additional $30 per year surcharge for the use of an air conditioner. The appellant has requested that the Agency increase her shelter allowance retroactively and include, therein, the air conditioner surcharge. The Agency has denied these requests. The appellant's request was made in August of 1973.

(3) The appellant has requested the Agency make provision for the payment of the cost of Christian Science nursing care. The Agency denied the request.

(4) The appellant requested a special grant or medical assistance authorization for the purchase of vaseline lotion, slippers and a robe recommended by the Christian Science nurse, and the appellant has also requested payment of transportation costs for shopping trips to purchase medical supplies. The Agency has denied both of these requests.

Pursuant to the provisions of Section 352.3 of the Regulations of the State Department of Social Services, each social services district is required to provide a shelter allowance in the amount actually paid but not in excess of the Agency's maximum pursuant to its rent schedule. The Agency submitted no evidence to establish that the appellant's

current rental is in excess of that allowable under its schedule. Accordingly, the Agency is required to increase the appellant's shelter allowance retroactively to June of 1973.

With respect to the appellant's request that her shelter be increased retroactively to June of 1971, Section 135-a of the Social Services Law provides that a request for a fair hearing must be made within 60 days of the date of the Agency's action or failure to act. Accordingly, the adequacy of the appellant's rent allowance retroactive to June of 1971 is no longer subject to review. Additionally, there is no provision under the Social Services Law or Departmental Regulations for the Agency to issue a special grant for the rental of an air conditioner.

With respect to the appellant's request that the Agency make provision

for the cost of Christian Science nursing care, there is no provision in the Social Services Law or Departmental Regulations to authorize such as an item of public assistance. Additionally, there is no provision under the medical assistance provisions of the Social Services Law or the Departmental Regulations which would allow the Agency to authorize this care as an item of medical assistance (Section 365-a.2 of the Social Services Law). Accordingly, the Agency properly denied this request of the appellant.

With respect to the appellant's request for the payment of the cost of vaseline lotion, slippers and a robe, the determination of the Agency to deny such request was also proper. There is no provision which would authorize payment for these items as they are not items of medical need (Section 505.3 of the Regulations). Such items are covered by the

appellant's basic needs allowance, and there is no provision for issuance of a special grant to purchase same. Accordingly, the Agency properly denied the request of the appellant for the aforementioned items.

Although there is provision in the Social Services Law and Regulations to meet the cost of transportation to receive medical treatment, there is no provision which would cover the cost of shopping trips to obtain medical supplies.

DECISION: The determinations of the Agency denying payment for rental of an air conditioner, the services of a Christian Science nurse, the cost of vaseline lotion, slippers and a robe and the transportation cost incidental to purchase medical supplies are affirmed. The determination of the Agency relative to the appellant's current shelter

DECISION AFTER FAIR HEARING

allowance is not and cannot be affirmed and the Agency is directed to increase the appellant's shelter allowance retroactive to June of 1973. The appellant's request for a retroactive shelter allowance to June of 1971, is not subject to review. The Agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the State Department of Social Services.

Dated: Albany, New York

ABE LAVINE
Commissioner

BY:
CARMEN SHANG
Assistant Commissioner

Markewich, J.P., Lupiana, Tilzer, Capozzoli, Lane, JJ.

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MIRIAM WINTERS

Petitioner, J.A. Weiss

- against -

THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET ANO.,

Respondents. M. Weinberg

Determination of the respondent State Commissioner of Social Services dated February 20, 1974, which after a fair hearing affirmed a determination of the New York City Department of Social Services denying petitioner's requests for (1) an increase in shelter allowance retroactive to June, 1971 and (2) for the payment of the cost of Christian Science nursing care, unanimously modified on the law to grant the shelter allowance increase retroactive to June 1971 and as so modified the deter-

mination is confirmed without costs or disbursements.

The hearing officer found that prior to June of 1971 petitioner received a shelter allowance of $140, which amount was equal to the actual rent then being paid. It was also found that in June of 1971 petitioner's actual rent was increased to $154.20 per month and that there was a further increase in February of 1973 to $160 per month. Although it was found that the petitioner was entitled to a shelter allowance equal to the actual rent being paid her, there being no evidence to show that such amount was in excess of respondents' rent schedules, nevertheless, the increase in shelter allowance was made retroactive only to June of 1973, when the application for increase was brought, rather than to June 1971 when the increased costs were first incurred. The determination

was based upon a finding that petitioner failed to make a timely request for a hearing in accordance with Social Services Law §135-a. That section provides that a request for a fair hearing "must be made within 60 days after the date of the action or failure to act complained of." However, there is nothing in this record to indicate that petitioner did not comply with that time limitation. Under the respondents' version of the facts, the first application for a shelter increase was made in June of 1973. When that application was denied, petitioner, in August of 1973, requested a fair hearing and that was well within the 60 day time period. If the petitioner's version of the facts is accepted, the request for a fair hearing was also timely. According to the petitioner, she made numerous requests for an increase

prior to June 1973. However, prior to June 1973, she never received written notice of the Agency's adverse determination nor was she informed of her right to a fair hearing. In the absence of such notification, it cannot be said that the 60 day period started to run (Kantanas v. Wyman, 38 A D 2d 849).

However, the request for the payment of the cost of Christian Science nursing care was properly denied. Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education Law §6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law §365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received.

Order filed.

DECISION COURT OF APPEALS
APR 29 1976

1 Mo. No. 457 SSD 34
Miriam Winters,

Appellant,

vs.

The Commissioner of the New York State Department of Social Services and the Commissioner of the New York City Department of Social Services,

Respondents.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

EXHIBIT H

March 1, 1974

Bureau of Medical Assistance
330 West 34th Street
New York, New York

re: Miriam Winters
St. George Hotel
Brooklyn, New York

AD 1479709

Dear Sirs:

Enclosed is a bill covering medical care for the above-named client. As you are probably aware, Christian Science treatments must be considered in the same manner as all other medical treatments.

Your prompt attention to this matter will be very much appreciated.

Very truly yours,

JONATHAN A. WEISS

JAW:lv
Enclosure

EXHIBIT H

BENJAMIN N. RIPPE, C.S.
26 COURT STREET
BROOKLYN, N.Y. 11242
TELEPHONE 625-1441

Feb. 27, 1974

Miss Miriam Winters
Hotel St. George
Brooklyn, N. Y. 11201

To professional services:

Christian Science treatments-

1973 - Sep. 22-30
Oct. 1-5,9-13,15-17,19,22,23, 25,26,30,31
Nov. 1,2,5-7,9,12-14,16,18-21, 25-28
Dec. 3,5,6,10-12,14,17-19,21, 26-28,31

1974 Jan. 2-4,6-8,10,11,14-18,20-23, 25,29-31
Feb. 4,5,8,11-14,18,19,21,24-27

97 treatments at $4.00	$388.00
Less 50% (extended treatment)	194.00
	$194.00
Received on account	20.00
Balance	$174.00

EXHIBIT I

THE CITY OF NEW YORK

DEPARTMENT OF HEALTH
Medical Assistance Program
(MEDICAID)
BUREAU OF HEALTH CARE SERVICES
330 WEST 34th STREET (3rd Floor)
NEW YORK, N.Y. 10001

Telephone: 790-3017

March 7, 1974

Mr. Jonathan A. Weiss, Director
Legal Services for the Elderly Poor
2095 Broadway Suite 304
New York, New York 10023

Dear Mr. Weiss:

I am in receipt of your letter dated March 1, 1974.

There is no fee or code listed in the State Medical Handbook for Christian Science treatments. Therefore, we will not be able to pay for these services. If the State Health Department were to set a fee for these services we would then be able to pay them. I suggest you refer any further correspondence to the New York State Health Department.

Sincerely,

/s/
Lee B. Reichman, M.D., M.P.H.
Executive Medical Director
Medicaid

LBR/bb

EXHIBIT I

EXHIBIT J

March 12, 1974

DEPARTMENT OF HEALTH
OF THE STATE OF NEW YORK
84 Holland Avenue
Albany, New York 12208

Re: Miriam Witners
51 Clark Street, Brooklyn, New York

Dear Sirs:

I represent Miss Miriam Winters, who is eligible and receives Medicaid. Enclosed is a bill incurred by my client for professional services rendered to her by her Christian Science Practitioner. This bill was forwarded to the New York City Medicaid Department and the New York City Department of Health and payment was denied by both agencies. As you know, federal and state regulations provide for payment of such treatment and, of course, the Constitution would mandate payment of the $194.00.

Please advise as to how you will pay for this claim. Thank you for your attention to this matter.

Yours truly,

Jonathan A. Weiss

JAW/am
Encl.

EXHIBIT K

HOLLIS S. INGRAHAM, M.D.
COMMISSIONER

DIVISION OF MEDICAL
CARE SERVICES AND
EVALUATION

JAMES D. WHARTON, M.D.
M.P.H.
ASSISTANT COMMISSIONER

BUREAU OF MEDICAID
PHILIP A. ROOSS
DIRECTOR

STATE OF NEW YORK
DEPARTMENT OF HEALTH
28 ESSEX STREET
ALBANY, NEW YORK 12206

March 21, 1974

Jonathan A. Weiss
Director
Legal Services for the Elderly Poor
2095 Broadway - Suite 304
New York, New York 10023

Dear Mr. Weiss:

In the development of a Title XIX program, states have certain options in the scope of services which are to be included in an individual state program.

In New York State, the full range of services which is available to eligible Medicaid recipients is contained in section 365-a of Title II

EXHIBIT K

of the New York State Social Services Law. This listing of services does not include services rendered by a Christian Science Practitioner. Since such service is not one of those which states are required by federal law and regulation, to include in an approved state program, omission of Christian Science Practitioner service from our Medicaid program in New York State is not violative of existing federal law and/or regulation.

There is therefore no provision or means to pay for "Christian Science treatments" under current provisions of our Medicaid program in New York State.

Very truly yours,

/s/

Philip A. Rooss
Director
Bureau of Medicaid

In the Matter of the Appeal of

MIRIAM WINTERS

from a determination by the New York City Department of Social Services (hereinafter called the agency)

:DECISION AFTER :FAIR HEARING

A fair hearing was held at 2 World Trade Center, New York, New York on March 7, 1974 before John Burke, Hearing Office, at which the appellant and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of medical assistance. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found

(1) The appellant, who lives alone, was a recipient of aid to the disabled up until December 31, 1973. Appellant

also has full medical assistance coverage.

(2) The appellant on August 26, 1973, and September 18, and 21, 1973, was treated by a Christian Scientist practitioner, and has received a bill for $70.00 for such treatment.

(3) The appellant is practicing Christian Scientist.

(4) The appellant's request for payment of the aforesaid bill was denied by the agency.

(5) At the hearing, the agency stipulated that the appellant has a choice of a practitioner is duly recognized as a Christian Scientist.

The record established that Benjamin Rippe is registered as a Christian Scientist practitioner at 26 Court Street in Brooklyn, and therefore, the appellant is entitled to be reimburse for the treatment so billed.

DECISION: The determination of the agency is not and cannot be affirmed. The agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

DATED: Albany, New York
MAR 27 1974

/s/
Abe Lavine
COMMISSIONER

By /s/
Carmen Shang
ASSISTANT
COMMISSIONER

June 13, 1974

Mr. Abe Lavine, Commissioner
The State of New York
Department of Social Services
2 World Trade Center
New York, New York 10047

Dear Mr. Lavine:

The purpose of this letter is to direct your immediate attention to a most serious breach of statutory responsibility on the part of the Department of Litigation of the State Department of Social Services. We are writing you in order to avoid the necessity of burdening the courts and perhaps embarrassing you.

In a Fair Hearing decision of March 27, 1974 (copy enclosed), signed by yourself and Carman Shang, our client Miss Miriam Winters was awarded a $70.00 judgment for medical expenses incurred, to be apid (sic) under the Medical Assistance program. The last official word that either our office or Miss Winters had heard on the case was a notice of Transmittal of Fair Hearing Decision accompanying the text of the favorable decision. When it became clear that no payment was forthcoming, we instituted inquiries to the Compliance Unit in Albany to determine the reason for the delay or possible error. After several phone conversations with that office and with the Bureau of Medical Assistance in New York City, it became clear that the lack of compliance was deliberate and

was being directed from the Department of Litigation of the State Department of Social Services. Yesterday, Mr. David Kellogg of that office confirmed this fact in no uncertain terms, in a telephone conversation with a law student in our employ. See the enclosed affidavit regarding the substance of that conversation. Mr. Kellogg's position as presented therein indicated that it might be advisable for you to discuss the lawful gounds of administrative discretion with him.

This bald refusal of administrative officials to comply with statutory obligations is shocking. The violations of the explicit commands of 18 NYCRR secs. 358.18(a) and 358.22 are crystal clear. For an administrative official to openly refuse compliance and invite us to bring an Article 78 proceeding as the only way of forcing his hand is behavior totally outside the bounds of administrative, judicial procedure and due process.

We are most reluctant to bring this state of affairs to the stage of public proceedings if it can be avoided. The situation is an embarrassment both to your office and those of us who believe in the principles on which our government is supposed to function. At this time, we request your cooperation in seeing that the appropriate officials follow their statutory duty in this matter. Hopefully further proceedings will therefore not be necessary, as they would certainly be a needless waste of taxpayers' money. We await your reply. Thank you for your anticipated prompt

cooperation.

Very truly yours,

Jonathan A. Weiss

Encls.
cc: Carmen Shang
Registered Mail--RRR

LEGAL SERVICES FOR
THE ELDERLY POOR

2095 Broadway
Suite 304
New York, N.Y. 10023
(212) 595-1340

Jonathan A. Weiss
Director

August 10, 1976

The Honorable Paul R. Hays
United States Court of Appeals
United States Court House
Foley Square
New York, NY 10007

The Honorable John R. Bartels
The Honorable John F. Dooling, Jr.
United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

re: Miriam Winters, vs. The Commissioner of the Department of Social Services, State of New York, and The New York City Commissioner of Social Services.

Sirs:

Enclosed please find individual copies of the Jurisdictional Statement I filed in the United States Supreme Court while awaiting the decision in this case. As I understand your decision, particularly the passages around footnotes 8 and 9, the constitutional question was clearly and explicitly submitted to the state courts and that absention was appropriate until the highest state court spoke.

As the Jurisdictional Statement reveals, the Court of Appeals as well as the Appellate Division have now spoken negatively on the constitutional issue. The Jurisdictional Statement was filed with the explicit proviso that if there were an adverse decision in this three-judge court that would be appealed to the Supreme Court with both matters to be consolidated. I think, therefore, the case is no longer appropriate for abstention but am not clear on how to proceed.

I should be glad to file whatever motion is required or, if this court indicates no motion is now possible, to appeal directly to the United States Supreme Court. I, therefore, request guidance from this panel as to the correct procedural posture and steps. I await a response in whatever form is appropriate, apologize for troubling the court and thank the court in advance for any guidance it may give me.

Very truly yours,

/s/
JAW/em Jonathan A. Weiss
enc.
cc: Honorable Louis J. Lefkowitz
Honorable W. Bernard Richland
Thomas R. McLoughlin, Esq.
Gary L. McMinimee, Esq.
Of Counsel
HINMAN, HOWARD & KATTELL, Esqs.
A. Lawrence Abrams, Esq.
Eugene E. Peckman, Esq.
Of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MIRIAM WINTERS, individually and in behalf of all other persons similarly situated, Plaintiff, -against- ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services; JAMES R. DUMPSON, individually and as Commissioner of the New York City Department of Social Services, Defendants.	CIVIL ACTION No. 74 C 1703

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MIRIAM WINTERS, the plaintiff above-named hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint and abstaining, entered in this action on July 21, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

/s/

JONATHAN A. WEISS
Legal Services for the Elderly Poor
Counsel for Plaintiff
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-407

MIRIAM WINTERS,
Plaintiff-Appellant,
against
ABE LAVINE, et ano.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE ABE LAVINE

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Attorney for Appellee Abe Lavine
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-4178

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. MCMURRY
Assistant Attorney General
of Counsel

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TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-407

MIRIAM WINTERS,
Plaintiff-Appellant,
against
ABE LAVINE, et ano.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE ABE LAVINE

Appellee Abe Lavine moves pursuant to Rule 16 of the Rules of this Court for dismissal of the appeal from the judgment of the United States District Court for the Eastern District of New York, entered July 21, 1976, dismissing the complaint on grounds of *res judicata* as to one claim and abstaining as to another claim. In the alternative, appellee moves for affirmance of the judgment below.

Opinion Below

The opinion below is not reported and is reproduced in Appellant's Jurisdictional Statement.

Jurisdiction

Appellant purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

Statute Involved

New York Social Services Law § 365-a.

Questions Presented

1. Whether the District Court correctly ruled that appellant's constitutional claim for reimbursement for nursing care was foreclosed by *res judicata*?

2. Whether a majority of the District Court properly abstained from deciding appellant's constitutional claim for reimbursement for practitioner services, and in the alternative whether the failure of such practitioners to be licensed under New York Law constitutes a grounds for dismissing the complaint entirely?

Statement of the Case

Appellant Miriam Winters purports to be a follower of the beliefs and practices of the Christian Science faith, although she is not actually a member of the Church. She claims not to believe in employing the services and treatments of ordinary medical doctors and nurses in treating illness. Rather, she claims to believe that any illness can be effectively cured by religious treatments administered by certain Christian Science practitioners and nurses, whether or not licensed by the State of New York.

On four different occasions appellant incurred expenses for the services of Christian Science nurses and practitioners. Each time appellant sought reimbursement from

the New York City Department of Social Services pursuant to the New York Medicaid program.

One of the four claims was for reimbursement for Christian Science nursing services. The claim was denied by the New York City Department of Social Services in November, 1973, and the denial was affirmed by the State Department of Social Services in February, 1974, on the ground that Social Services Law § 365-a(2) did not authorize such reimbursement. The Appellate Division of the State Supreme Court affirmed the denial in October, 1975.

The other three claims involved requests for reimbursement for the services of Christian Science practitioners. In one instance, the State Department of Social Services granted reimbursement. In another instance, the State Department denied reimbursement; an appeal to the Appellate Division was pending at the time of the decision below. In a third instance, a request for reimbursement had not been answered at the time of filing the complaint.

Plaintiff contends that her First Amendment right to pursue her religious beliefs was violated in those instances in which she was denied reimbursement.

The court below found it unnecessary to reach the merits of plaintiff's First Amendment claim. The entire court found that the doctrine of *res judicata* barred the claim for nursing care reimbursement. Two members of the court found that the dotcrine of abstention required the court to stay its hand as to the practitioner reimbursement claim. A third member of the court found that no First Amendment issue was raised as to reimbursement for practitioner services since the practitioners in question were not licensed to practice under New York law.

The disposition of the court below was entirely correct for the reasons set forth below.

ARGUMENT

The District Court correctly held that appellant's nursing care claim was barred by *res judicata*. A majority of the District Court properly abstained from deciding appellant's practitioner services claim; in the alternative the complaint should be dismissed.

Res Judicata

The entire panel found that appellant's nursing care reimbursement claim was barred by the doctrine of *res judicata*. In so concluding, the court simply applied elementary and established principles of law to a simple set of facts. It has been widely held, as this Court noted in *Preiser* v. *Rodriquez*, 411 U.S. 475, 497 (1973), that the doctrine of *res judicata*, based on State court determinations, may be applied in federal civil rights actions. See, also *Thistlewaite* v. *City of New York*, 497 F. 2d 330 (2d Cir. 1974); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 164-165 (1932) (Full Faith and Credit Clause requires that State court judgments be given the same *res judicata* effect in Federal court as in State court, even when federal constitutional questions are involved). Appellant cites no authority to the contrary. *Newman* v. *Board of Education*, 508 F. 2d 277 (2d Cir.) cert. denied, 420 U.S. 1004 (1975), cited by appellant, is totally inapposite, since there the Court of Appeals found that plaintiff had failed completely to raise her federal constitutional claims in State court.

In this case the court below found, after an examination of the briefs submitted by both parties to the Appellate Division, First Department, that the appellant's nursing reimbursement claim of unconstitionality was "clearly and explicitly" submitted to that court in her Article 78 proceeding in State court.

Appellant does not now deny that her constitutional claim was presented to the State court. Rather, she argues that her claim was made "in the context" of a

state law claim, and implies that the claim was merely mentioned in State court. However, appellant offers no evidence to support that view.* Further, the court below was well aware that mere mentioning of a constitutional claim in State court would be insufficient for *res judicata* purposes, citing *Newman* v. *Board of Education, supra*. The Court ruled that elaboration of the claim with supporting citations of authority would be required (A. 49), and appellant does not dispute that her claim was not elaborated in this fashion.

Appellant claims that the opinion of the Appellate Division does not mention any constitutional issue. This, of course, is irrelevant for purposes of *res judicata* analysis. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 477-478 (1930). *Accord, Lecci* v. *Cahn*, 493 F. 2d 826, 830 (2d Cir. 1974); *Tang* v. *Appellate Division*, 487 F. 2d 138, 141, n. 2 (2d Cir. 1973) cert. den. 416 U.S. 906 (1974). As the Court below correctly noted, under State law a final judgment on the merits is conclusive as to the rights of all parties with respect to issues actually raised and litigated even if not decided by the court and has *res judicata* effect. Under the authorities discussed above such *res judicata* effect would, of course, apply in a federal civil rights action.

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* The appellant's Appellate Division Brief, on which the Court below based its conclusion that the claim had been "clearly and explicitly" presented to the state courts, has not been included in appellant's jurisdictional statement. However, it is clear that that brief did not simply "mention" the constitutional claim as was the case in *Newman, supra*. Rather, one of the two main "POINTS" in the brief was entitled, "The Decision of the Department of Social Services Not to Authorize Public Assistance for the Cost of Christian Science Nursing Care is Violative of the First Amendment." The argument under this point heading discussed *Sherbert* v. *Verner*, 374 U.S. 393 (1963) and its alleged applicability to appellant's situation. Appellant's reply brief again discussed the First Amendment issue, citing *Sherbert* v. *Verner, supra*, and *Winters* v. *Miller*, 446 F. 2d 65 (2d Cir. 1971).

In this connection, it must be noted that the Appellate Division found, *inter alia*, that there was "insufficient [sic—probably should be "evidence"] in the record to indicate either the nature of her illness or of the treatment which she received." (A. 111). Apart from any alleged *constitutional* issue, it is clear that this *factual* determination is final and binding on a Federal court; appellant may not relitigate the sufficiency of her evidence in Federal court. *Siegel* v. *National Periodical Pub., Inc.*, 508 F. 2d 909, 913 (2d Cir. 1974); *Venitron Corp.* v. *Benjamin*, 440 F. 2d 105, 108 (2d Cir.), cert. den. 402 U.S. 987 (1971) in accord, *Rooker* v. *Fidelity Trust Co., supra.*

In view of all the above circumstances, and since the parties in the Federal and State proceedings were identical, the conclusion that *res judicata* applied in the § 1983 action was inexorable.*

A related issue in this case and not recognized by appellant is the question of primary forum choice. Having chosen to litigate federal claims in a state forum, no salutary purpose is served by ignoring the State court's disposition and relitigating the issue all over again in Federal court. *England* v. *Board of Medical Examiners*, 375 U.S. 411 (1964). "[W]here a constitutional issue is actually raised in the state court . . . the litigant has made his choice and may not have two bites of the cherry." *Lombard* v. *Board of Education of City of New York*, 502 F. 2d 631, 636-637 (2d Cir. 1974). See also *Tang* v. *Appellate Division, supra; Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). A second bite at the cherry is precisely what appellant is seeking.

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* Appellant claims that the State Court of Appeals *sua sponte* dismissed an appeal to that Court because "no substantial question is directly involved" (A. 112). According to the appendix, that decision was rendered April 29, 1976. The subsequent opinion of the court below (A. 50) suggests that that court was unaware of this. In any event, in view of the disposition of the State Court of Appeals, the authorities and reasoning of the court below remain fully applicable.

Abstention

As to the claims for reimbursement for practitioner services, two members of the panel (HAYS, C.J. and BARTELS, D.J.), found that the court should abstain. This conclusion was entirely correct. In deciding to abstain the majority simply applied basic principles of law to an uncomplicated set of facts.

When a constitutional claim involving a state statute is at issue, it is appropriate for a Federal court to abstain when (1) the state statute involved is unclear or its interpretation uncertain; (2) the resolution of the constitutional issue must depend on the interpretation of state law, and (3) the state law must be susceptible to an interpretation which would avoid the federal constitutional issue. See *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973); *Lake Carriers Assn.* v. *Mac Mullan*, 406 U.S. 498 (1972); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *McRedmond* v. *Wilson*, 533 F. 2d 757 (2d Cir. 1976).

In this case, all three conditions were present. As the majority below noted, the State Department of Social Services had taken contradictory action on two identical claims for reimbursement of practitioner services. Thus, plainly the statute in question was unclear. As to the other two criteria, the majority below noted that the terms of the statute were broad and non-exclusive and would be susceptible to an interpretation favorable to appellant and which would save the constitutional question. The majority further noted that such an interpretation was a distinct possibility since appellant had already one favorable ruling by the State Department of Social Services. Clearly, all the prerequisites for abstention were present here.

On numerous recent occasions, conveniently ignored by appellant, this Court has ordered abstention in a wide variety of contexts where the State statute was unclear or susceptible to an interpretation that would save the constitutional issue. *Belotti* v. *Baird*, 44 U.S.L.W. 5221

(7/1/76); *Boehning* v. *Indiana Employees,* 423 U.S. 6 (1975); *Harris County Commrs. Court* v. *Moore,* 420 U.S. 77 (1975). The same principles are clearly applicable to the case at bar.

Appellant urges that she is in a procedural box, and that the court below has in effect told her that "both going and not going to State courts" prevents vindication of her federal rights. This claim is without merit.

Appelant appears to be deliberately confusing and mixing the nursing reimbursement claim and the practitioner reimbursement claim.* It is important to separate these two claims. The *res judicata* portion of the Court's ruling applies only to the "nursing" constitutional claim, which was litigated in State court. The "abstention" portion of the decision applies only to the "practitioner" constitutional claim. As of the decision of the court below, no state court decision had yet been rendered on the New York Statute's applicability to Christian Science practitioners.

Thus, appellant faces no "dilemma" here, as there is no "deadly combination" of *res judicata* and abstention. The court below applied these concepts to two separate claims.

The purpose of abstention is to afford state courts a chance to interpret or clarify state law so as to avoid constitutional questions. The purpose is *not* to afford state courts a chance to pass on federal constitutional claims. Thus, the *res judicata* bar will not arise in a case in which a Federal court abstains unless the claimant chooses to

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* See First "Question Presented," Jurisdictional Statement, p. 5; see letter of counsel to three-judge court dated August 10, 1976 (A. 126), referring to footnotes "8" and "9" of the Court's decision and suggesting that abstention is no longer appropriate. In fact, footnotes "8" and "9" were footnotes to a discussion of the nursing claim, the decision on which turned on *res judicata, not* abstention. The Court below evidently apprised counsel of his error in a "phone call" (Jurisdictional Statement, p. 9), although appellee herein was not privy to this "phone call." See also subheading entitled "Deadly Combination" (Jurisdictional Statement, p. 13).

litigate fully in State court not only his state law claims but his federal constitutional claims, as appellant did with her nursing care claim. Thus, there is no procedural box here.

Appellant says she only wants her day in court. As to the nursing claim, appellant has already had her day in court. As to the practitioners claim, she is being afforded her day in court.

Judge Dooling's concurring opinion* on the question of reimbursement for practitioner services is a valid independent basis for dismissing the complaint entirely. Judge Dooling found that as to these practitioner claims no constitutional issue was raised since appellant's practitioners were not licensed under New York Law and the State had the right to license practitioners of medicine provided there was no blanket exclusion of therapies in which prayer or beliefs are the active agents simply because, and for no other reason, the agent is characterized as "religious." In view of the State's broad discretion in the exercise of its police power especially in the field of health, such a conclusion was entirely correct. *Barsky* v. *Board of Regents,* 347 U.S. 442, 449 (1954).

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* Incorrectly referred to by appellant as a "dissent." See Jurisdictional Statement, p. 17.

CONCLUSION

The appeal from the judgment below should be dismissed. In the alternative, the judgment below must be affirmed.

Dated: New York, New York, November 19, 1976.

Respectfully submitted,

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